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FILED

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No. ~~OFFICE~~ OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BEVERLY B. MANN,

Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA and JAYNE W. BARNARD,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

67pp

QUESTIONS PRESENTED

1. Whether a federal circuit rule that permits the resolution of appeals by unpublished order may entitle an appellate court to avoid applying extensive pertinent settled law to arbitrarily selected cases, or whether, instead, a federal appellate court's use of that rule as a device by which to exempt some cases from application of the law actually creates two parallel bodies of law utterly independent of each other and thus violates the fundamental dictate of the Fifth Amendment's Due Process Clause.

2. Whether a federal appellate court must apply the doctrines of the law of the case and of waiver of claims and defenses as those doctrines are delineated in nearly 60 published opinions issued by that same appellate court within the last five years and by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997), when a plaintiff asserts those doctrines in a successive appeal as having precluded defenses *after fourteen years of litigation*, or whether, instead, appellate-court application of those doctrines is merely optional as long as the appeal is resolved via unpublished (and mostly unexplained) order.

3. Whether, prompted by a belief that unpublished appellate resolution that deviates from universally established law is of no large importance because it does not actually alter the law, an *en banc* federal appellate court is entitled to promulgate an internal court policy that prohibits it from hearing, *en banc*, any appeal that was resolved by unpublished order – or whether, instead, such a policy *itself* fundamentally and impermissibly alters the law by effectively (albeit quietly) dismantling the Equal Protection component of the Fifth Amendment's Due Process Clause and perhaps the Due Process Clause itself.

4. Whether defendants in civil litigation waive affirmative defenses – in this case, the assertion of tort immunity by virtue of Illinois' local governmental and governmental-employee immunity statute, and the assertion of an innocent-construction defense to allegations of defamation – that they fail for nearly thirteen years to assert and then assert only in a summary judgment motion without first complying with Fed. R. Civ. P. 8(c), and whether the (unpublished) decision of the Court of Appeals for the Seventh Circuit to allow this practice conflicts with the published law of the Court of Appeals for the D.C. Circuit as stated in *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997).

5. Whether a state's local governmental and governmental-employee tort immunity statute, when interpreted by the district and appellate courts to establish an irrebuttable presumption of *fact* concerning motive and other issues of state of mind of defendant government officials, violates the Fourteenth Amendment's Due Process Clause and the Seventh Amendment's right to jury determination – particularly when the statute *itself* is held to *require* a finding of *fact* that defamatory statements made by the officials were *accurate* or at least were made "*objectively,*" a finding that in this case contradicts the defendants' own admissions in trial and deposition testimony and the district court's oral comments as transcribed and included in the record.

6. Whether a federal court's decision to treat state common law counts that allege defamation and tortious interference with prospective economic as at-will wrongful employment-discharge counts, notwithstanding expressly contrary and uncontraverted authority of that state's highest court, constitutes a flagrant denial of the constitutional guarantees of due process of law and equal protection of the law.

7. Whether determination of the issues of motive and other state of mind of the defendants in a civil lawsuit can *ever* appropriately be determined by the court without reference to, and without consideration of, the evidentiary record, or whether, instead, a determination of *fact* by operation of *law* – in this instance, by operation of a governmental tort immunity statute – inherently constitutes a denial of due process of law and of the right to jury determination of fact in common law lawsuits.

8. Whether defendants in civil litigation are entitled to obtain *sequential, mutually exclusive sets of summary judgments*, and have them respectively affirmed in successive appeals, simply by parsing the conflicting defenses into separate summary judgment motions (and appeals) several years apart, first asserting one set of facts and then asserting the opposite, thus accomplishing in successive motions and appeals what they could not have accomplished in a single motion and a single appeal.

9. Whether the tactic described in Question 8, when allowed by an unpublished federal appellate order *that conflicts with explicit statements in four published opinions issued by that court the same year*, effectuates a denial to the plaintiff of due process of law and equal protection of the law in contravention of the Fifth Amendment.

10. Whether employment blacklisting by a local government via defamation of an individual within the community where she lives violates the Fourteenth Amend-ment's Due Process Clause (or whether, instead, the issue is unworthy of discussion by a federal court of appeals in affirming the dismissal pursuant to Fed. R. Civ. P. 12(b)(6) of a count alleging such a violation.

11. Whether a complaint that alleges significant and knowingly inaccurate defamation and tortious interference with prospective economic advantage (including

specific acts of successful employment blacklisting of an attorney throughout a 20-month period) by the defendant officials of a local governmental entity, effectuated to advance the personal interests of those officials, fails to state a claim for violation of the Fourteenth Amendment's Due Process Clause, notwithstanding the following:

a. an explicit earlier appellate finding in the case that sufficient evidence exists to establish that the defendants acted with actual malice as that term is defined for those respective torts in *Mittelman v. Witous*, 135 Ill. 2d 220 (1989), and *Fellhauer v. City of Geneva*, 142 Ill. 2d 495 (1991);

b. a finding by the district court after 13 years of litigation (and affirmed by the appellate court in the unpublished order that prompts this Petition) that a section of the Illinois Local Governmental Tort Immunity Act, specifically 745 ILCS § 10/2-201, accords the defendants absolute immunity from state-tort liability for such actions;

c. this Court's opinion in *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), and footnote 4 in Justice Kennedy's concurrence;

d. This Court's opinion in *Albright v. Oliver*, 114 S. Ct. 807 (1994), and the concurrence of Justices Kennedy and Thomas;

e. this Court's opinion in *Milkovich v Lorain Journal*, 497 U.S. 1 (1990), which was based upon "society's pervasive and strong interest in preventing and redressing attacks upon reputation."

f. this Court's opinion in *Haddle v. Garrison,* 119 S. Ct. 489 (1998), which acknowledges that personnel decisions and defamatory statements by government officials may be effectuated purely to advance the personal interests of those officials;

12. Whether, once a defendant municipality and defendant municipal officials have asserted in memoranda to the court (and later in their appellate brief) that the officials

indeed were "serving in a position involving the determination of policy" and that the "act or omission" that caused the "injury" indeed occurred "from [their] act or omission *in determining policy*" – and once summary judgment has been entered in their favor on state-law tort counts upon a finding of state statutory tort immunity by virtue of that single asserted fact – the federal appellate court nonetheless was correct in treating the years-earlier dismissal of several corresponding civil rights counts as "unworthy of any discussion" (and, in fact, even of mention), notwithstanding the following opinions of this Court, five of them featured prominently in Petitioner's opening appellate brief:

St. Louis v. Praprotnick, 485 U.S. 112 (1988);
Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701 (1989);
County of Sacramento v. Lewis, 523 U.S. 833 (1998).
Albright v. Oliver, 114 S. Ct. 807 (1994), (and concurrence of Justices Kennedy and Thomas);
Parratt v. Taylor, 451 U.S. 527 (1981);
McMillian v. Monroe County, 520 U. S. 781 (1997);
Conn v. Gabbert, 119 S.Ct. 1292(1999);
Monterey v. *Del Monte Dunes*, 119 S.Ct. 1624 (1999).

13. Whether the "timeliness" requirement of Federal Rule of Civil Procedure 60(b) is met when the altered circumstances by which the Rule 60(b) motion is brought arise from the issuance of United States Supreme Court authority released two days before the motion is brought and six weeks after final summary judgment was entered in the litigation, and also from a reversal of a sudden recent position of fact as represented in written submissions to the court, and when the entry of the summary judgment itself constitutes new circumstances in light of the new Supreme Court authority.

14. Whether this Court's issuance of its opinions in *County of Sacramento v. Lewis, supra.*, and *Burlington Industries,*

Inc. v. Ellerth, 118 S.Ct. 2257 (1998), and *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998 (1998), and constituted sufficiently new circumstances to require reconsideration of summary judgments and a Rule 12(b)(6)dismissal under the doctrine of the law of the case as this Court has defined it in *Agostini v. Felton, supra.*

15. Whether, when a federal circuit court repeatedly states a policy to certify questions to a state's highest court arising under state's law when the state's highest court has never addressed the question and the determination of it would determine the outcome of the case on appeal, that federal circuit court's failure to do so in a particular appeal violates the Fifth Amendment's Due Process Clause. (See *Yang v. City of Chicago*, Nos. 98-4238 and 98-4330, 7th Cir. Nov. 29, 1999; *Todd v. Societe BIC*, 9 F.3d 1216 (7th Cir. 1993).)

16. Whether defendants in a defamation lawsuit, and a federal appellate court, can circumvent this Court's holding in *Milkovich v. Loraine Journal*, 497 U.S. 1 (1990), simply by styling their First Amendment defense (for the first time nearly 13 years into the pendency of the lawsuit) as one of innocent construction rather than of opinion, particularly when the single case authority the court cites in support is one issued by the Illinois Supreme Court four years before the earlier remand for retrial of the court suddenly found to be protected by the innocent construction doctrine. (The appellate court's order in this case adopted an assertion by the defendant-appellees that a 1992 Illinois Supreme Court opinion, which based its ruling in favor of a defamation *plaintiff* expressly upon *Milkovich*, created a protection for defamatory speech that *Milkovich* itself specifically rejected as required by the First Amendment.)

17. Whether an appellate court's own characterization of the grounds for an innocent-construction defense regarding

defamatory statements as "obvious" precludes the initial assertion of the defense nearly one and one-half decades after the lawsuit was filed – the specific purported innocent construction which, incidentally, was enunciated neither by the court nor the defendants.

18. Whether a federal appellate court is entitled to declare in an unpublished resolution of an appeal that state-tort damages for defamation and tortious interference with prospective economic opportunity are limited to the damages available for breach of contract, notwith-standing extensive, unequivocal and unremittingly consistent state law to the contrary – law that that federal appellate court has acknowledged and applied in numerous appeals resolved by published opinion.

19. Whether, alternative to Question 16, a federal appellate court's (apparent) finding of fact, without reference to the evidentiary record, that in a particular case the plaintiff did not sustain tort damages for defamation and tortious interference with economic advantage in an amount in excess of that allowed by a breach-of-contract-damages measurement constitutes a violation of the plaintiff's Seventh Amendment right to a jury trial.

20. Whether, alternative to Questions 16 and 17, a federal appellate court's limitation of a plaintiff's allowable monetary recovery for defamation to a breach-of-contract measure of damages rather than the normal allowance of a tort measure of damages violates that plaintiff's rights to due process and equal protection of the law when the sole apparent basis for the court's unusual damages limitation was the plaintiff's financial need after eleven years of expensive litigation to have a small breach-of- Whether contract monetary award severed from the remainder of the lawsuit.

21. Whether judicial misconduct, including brazen undisclosed conflict of interest, is beyond the scope of 28 U.S.C. § 372(c) as mere "error," or whether, instead, the interpretation of that statutory subsection as precluding consideration of judicial misconduct complaints on the basis that such misconduct constitutes "error" effectively nullifies the statutory subsection; and whether the availability of appeal to the United States Supreme Court via a petition for writ of certiorari eviscerates the obligations of a circuit's chief judge (and the circuit's judicial conference) as delineated in the statute.

22. Whether judicial misconduct, including brazen conflict of interest, is mere "error" and thus is beyond the scope of 28 U.S.C. § 372(c)(3)(A), or whether, instead, the preclusion of consideration of judicial misconduct complaints on the basis that such misconduct constitutes "error" effectively nullifies that statutory subsection, and whether the availability of appeal to the United States Supreme Court via a petition for writ of certiorari eviscerates the obligations of a circuit's chief judge (and judicial conference) as delineated in the statute.

23. Whether both a primary and a secondary reason for its result, courts are required to apply the ruling in all cases in which the stated primary reason exists, irrespective of the existence of the secondary reason in the particular case at issue, and, if so, whether an appellate court's failure to do so upon a finding that the stated secondary reason does not apply in the case at issue constitutes a denial of due process and of equal protection of the law.

24. Whether Federal Rule of Appellate Procedure 28(j) does not apply during the pendency of petitions for rehearing with suggestion for rehearing *en banc*, as the court stated in two orders it issued in this case during the recent six-week pendency of such a petition (notwithstanding that court's acceptance last spring of three Rule 28(j)

submissions, by the Department of Justice and by the American Civil Liberties Union and the Legal Assistance Foundation of Chicago, in another appeal.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Seventh Circuit were as follows:

Appellant: Beverly B. Mann

Appellees: The City of Chicago, James D. Montgomery, Timothy D. O'Hara, Jayne W. Barnard

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CONSTITUTIONAL, STATUTORY AND PROCEDURAL-RULE PROVISIONS AT ISSUE

1. United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. United States Constitution, Amendment XIV, § 1:

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. United States Constitution, Amendment VII:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

4. United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-201:

Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 1992).

6. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-107:

A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous.

7. Illinois Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/1-210 (1996):

"Willful and wanton conduct" as used in this Act means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.

8. Federal Rule of Civil Procedure 8(c):

(c) Affirmative Defenses.

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award,

assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

9. Seventh Circuit Rule 53. Plan for Publication of Opinions of the Seventh Circuit Promulgated Pursuant to Resolution of the Judicial Conference of the United States:

(c) *Guidelines for Method of Disposition.*

(1) *Published opinions.*

A published opinion will be filed when the decision

(i) establishes a new, or changes an existing rule of law;

(ii) involves an issue of continuing public interest;

(iii) criticizes or questions existing law;

(iv) constitutes a significant and non-duplicative contribution to legal literature

(A) by a historical review of law,

(B) by describing legislative history, or

(C) by resolving or creating a conflict in the law;

(v) reverses a judgment or denies enforcement of an order when the lower court or agency has published an opinion supporting the judgment or order; or

(vi) is pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court.

(2) *Unpublished orders.*

When the decision does not satisfy the criteria for publication, as stated above, it will be filed as an unpublished order. The order will ordinarily contain

reasons for the judgment, but may not do so if the court has announced its decision and reasons from the bench. A statement of facts may be omitted from the order or may not be complete or detailed.

10. Seventh Circuit Rule 52. Certification of Questions of State Law:

(a) When the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified. The certification will be made after the briefs are filed in this court. A motion for certification shall be included in the moving party's brief. (b) If the state court decides the certified issue, then within 21 days after the issuance of its opinion the parties must file in this court statements of their positions about what action this court should take to complete the resolution of the appeal.

11. Illinois Supreme Court Rule 20(a):

Certification. When it shall appear to the Supreme Court of the United States, or to the United States Court of Appeals for the Seventh Circuit, that there are involved in any proceeding before it questions as to the law of this State, which may be determinative of said cause, and there are no controlling precedents in the decisions of this court, such court may certify questions of the laws of this State to this court for instructions concerning such questions of State law, which certificate this court, by written opinion, may answer.

12. Federal Rule of Civil Procedure 60. Relief From Judgment or Order. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

13. 28 U.S.C. 372(c)

(1) Any person alleging that a circuit, district, or bankruptcy judge, or a magistrate, has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such a judge or magistrate is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct. In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.

(2) Upon receipt of a complaint filed under paragraph (1) of this subsection, the clerk shall promptly transmit such complaint to the chief judge of the circuit, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this subsection only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge or magistrate whose conduct is the subject of the complaint.

(3) After expeditiously reviewing a complaint, the chief judge, by written order stating his reasons, may

(A) dismiss the complaint, if he finds it to be (i) not in conformity with paragraph (1) of this subsection, (ii) directly related to the merits of a decision or procedural ruling, or (iii) frivolous; or

(B) conclude the proceeding if he finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events. The chief judge shall transmit copies of his written order to the

complainant and to the judge or magistrate whose conduct is the subject of the complaint.

(4) If the chief judge does not enter an order under paragraph (3) of this subsection, such judge shall promptly -

(A) appoint himself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(B) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(C) provide written notice to the complainant and the judge or magistrate whose conduct is the subject of the complaint of the action taken under this paragraph. A judge appointed to a special committee under this paragraph may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45 of this title. If a judge appointed to a committee under this paragraph dies, or retires from office under section 371(a) of this title, while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(5) Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

(6) Upon receipt of a report filed under paragraph (5) of this subsection, the judicial council -

(A) may conduct any additional investigation which it considers to be necessary;
(B) shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:

(i) directing the chief judge of the district of the magistrate whose conduct is the subject of the complaint to take such action as the judicial council considers appropriate;
(ii) certifying disability of a judge appointed to hold office during good behavior whose conduct is the subject of the complaint, pursuant to the procedures and standards provided under subsection (b) of this section;
(iii) requesting that any such judge appointed to hold office during good behavior voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply;
(iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;
(v) censuring or reprimanding such judge or magistrate by means of private communication;
(vi) censuring or reprimanding such judge or magistrate by means of public announcement; or
(vii) ordering such other action as it considers appropriate under the circumstances, except that (I) in no circumstances may the council order removal from office of any judge

appointed to hold office during good behavior, and (II) any removal of a magistrate shall be in accordance with section 631 of this title and any removal of a bankruptcy judge shall be in accordance with section 152 of this title;

(C) may dismiss the complaint; and

(D) shall immediately provide written notice to the complainant and to such judge or magistrate of the action taken under this paragraph.

(7) (A) In addition to the authority granted under paragraph (6) of this subsection, the judicial council may, in its discretion, refer any complaint under this subsection, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(B) In any case in which the judicial council determines, on the basis of a complaint and an investigation under this subsection, or on the basis of information otherwise available to the council, that a judge appointed to hold office during good behavior may have engaged in conduct -

(i) which might constitute one or more grounds for impeachment under article II of the Constitution; or (ii) which, in the interest of justice, is not amenable to resolution by the judicial council, the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(C) A judicial council acting under authority of this paragraph shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge or magistrate whose conduct is the subject of the action taken under this paragraph.

(8) (A) Upon referral or certification of any matter under paragraph (7) of this subsection, the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in paragraph (6)(B) of this subsection, as it considers appropriate. If the Judicial Conference concurs in the determination of the council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(B) If a judge or magistrate has been convicted of a felony and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under paragraph (7), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

(9) (A) In conducting any investigation under this subsection, the judicial council, or a special committee appointed under paragraph (4) of this subsection, shall have full subpoena powers as provided in section 332(d) of this title.

(B) In conducting any investigation under this subsection, the Judicial Conference, or a standing committee appointed by the Chief Justice under

section 331 of this title, shall have full subpoena powers as provided in that section.

(10) A complainant, judge, or magistrate aggrieved by a final order of the chief judge under paragraph (3) of this subsection may petition the judicial council for review thereof. A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph. Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(11) Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this subsection, including the processing of petitions for review, as each considers to be appropriate. Such rules shall contain provisions requiring that -

(A) adequate prior notice of any investigation be given in writing to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judge or magistrate whose conduct is the subject of the complaint be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(C) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

Any such rule shall be made or amended only after

giving appropriate public notice and an opportunity for comment. Any rule promulgated under this subsection shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this subsection may limit the period of time within which a person may file a complaint under this subsection.

(12) No judge or magistrate whose conduct is the subject of an investigation under this subsection shall serve upon a special committee appointed under paragraph (4) of this subsection, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331 of this title, until all related proceedings under this subsection have been finally terminated.

(13) No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this subsection.

(14) Except as provided in paragraph (8), all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that -

(A) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under paragraph (5) to the complainant whose complaint initiated the investigation by that special committee and to the judge or magistrate whose conduct is the subject of the complaint;

(B) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

(15) Each written order to implement any action under paragraph (6)(B) of this subsection, which is issued by a judicial council, the Judicial Conference, or the standing committee estabiished under section 331 of this title, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order issued under this paragraph shall be accompanied by written reasons therefor.

(16) Upon the request of a judge or magistrate whose conduct is the subject of a complaint under this subsection, the judicial council may, if the complaint has been finally dismissed under paragraph (6)(C), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge or magistrate during the investigation which would not have been incurred but for the requirements of this subsection.

(17) Except as expressly provided in this subsection, nothing in this subsection shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

(18) The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the foregoing provisions of this subsection, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In

investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this subsection.

14. 28 U.S.C. § 455. Disqualification of Justice, Judge, or Magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;
(ii) Is acting as a lawyer in the proceeding;
(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.
(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.
(d) For the purposes of this section the following words or phrases shall have the meaning indicated:
(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;
(2) the degree of relationship is calculated according to the civil law system;
(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;
(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:
(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;
(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;
(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the

outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

14. Federal Rule of Appellate Procedure 28(j):

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed – or after oral argument but before decision – a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons

for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

CITATIONS TO UNPUBLISHED ORDERS

This lawsuit, which was filed on December 31, 1984, in the Federal District Court for the Northern District of Illinois, Eastern Division, has twice been before the United States Court of Appeals for the Seventh Circuit. Both sets of appeals were resolved by unpublished order, the first on January 19, 1996, the second on July 14, 1999. The January 19, 1996, order, which appears in this Petition at App. D, is recorded at 1996 U.S. App. LEXIS 1669 (Nos. 92-3761, 92-3797). The July 14, 1999, order, which appears at App. C, is recorded at 1999 U.S. App. LEXIS 16219 (Nos. 98-1936, 98-2413 and 98-2797). A Petition for Rehearing with Suggestion for Rehearing *En Banc* filed on July 21, 1999, was denied in an order issued on September 3, 1999, and appears at App. B. It is recorded at 1999 U.S. App. LEXIS 21411.

District court memorandum opinions are recorded at No. 84 C 11020 (May 5, 1998), appearing at App. F; 1998 U.S. Dist. LEXIS 3195 (Mar. 13, 1998, No. 84 C 11020), appearing at App. E; 1994 U.S. Dist. LEXIS 9893 (Jul. 18, 1994, 84 C 11020 N.D. Ill.), appearing at App. H; 1986 U.S. Dist. LEXIS 22829 (Jul. 14, 1986), appearing at App. K; 1986 U.S. Dist. LEXIS 20968 (Aug. 29, 1986), appearing at App. J; 1986 U.S. Dist. LEXIS 16517 (Dec. 12, 1986), appearing at App. I. A three-paragraph minute order issued on June 8, 1998, is recorded at 84 C 11020 and appears at App. G.

An earlier Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit was filed immediately following the resolution of the first set of appeals, and was denied in an order issued on October 7, 1996 (96-260).

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). On July 14, 1999, the Court of Appeals affirmed various District Court orders that entered summary judgment

in favor of Respondents and against Petitioner on several counts pursuant to Federal Rule of Civil Procedure 56, and affirmed an order that dismissed another count pursuant to Federal Rule of Civil Procedure 12(b). (See App. C; App. G; App. L.) Petitioner timely filed a Petition for Rehearing with Suggestion for Rehearing *en Banc*, which was denied in an order entered on September 3, 1999. (See App. B). This Court on November 23, 1999, granted Petitioner's application for an extension of time, to and including January 1, 2000, in which to file this Petition. (See App. A.)

STATEMENT OF THE CASE

This lawsuit, as indicated above, dates back to 1984. It arises from the political infighting among factions of the City of Chicago Democratic Party that began during the City's mayoral primary election campaign in early 1983.

Beverly Mann is an attorney who in 1979, shortly after receiving her law license, was hired at the behest of the City's mayor at the time, Jayne Byrne, as an assistant City corporation counsel. Mann was not a political activist, nor was any member of her family, but her father, a Chicago journalist, was a longtime colleague and friend of Byrne's husband, veteran Chicago Daily News City Hall reporter Jay McMullen.

Mann was assigned to the Law Department Torts Division. Her immediate supervisor was defendant Timothy O'Hara, who headed the Torts Division. As O'Hara testified, he had on several occasions before the spring of 1983 dissuaded Mann from resigning from the Law Department and, also on several occasions, had persuaded her to withdraw requests she had submitted to transfer to another division within the Law Department. One such incident occurred in January, 1983, in which he obtained a pay raise for her in exchange for her withdrawal of her resignation.

O'Hara in his testimony described Mann's job performance in each category and in various specific instances as "excellent," "better than average," and "great." He also testi-

fied that, by his standards, Mann had never lost a trial; she always had obtained either a "Not Guilty" verdict or a judgment in an amount less than the plaintiff's final pretrial demand. He admitted that he on numerous occasions in conversations with others in the office had praised Mann's competence and ability as an attorney. He added in his testimony that, in his opinion, Mann indeed was an able attorney and was competent in her job.

In February, 1983, Byrne was defeated for re-nomination by Harold Washington in the primary election after a particularly nasty three-candidate campaign. Mayor Washington was inaugurated in April, 1983. He immediately appointed defendant James Montgomery as City Corporation Counsel. Montgomery, in turn, hired defendant Jayne Barnard, the wife of a friend of his, as his chief deputy in charge of personnel matters.

Barnard began her job in August, 1983. That month, she devised a written job-performance evaluation system by which the Law Department division heads were to evaluate the job performance of their subordinate attorneys. O'Hara rated Mann as incompetent or barely competent in the "job duties" categories and also defamed her in the "personal characteristics" categories. In the space provided on the last page of the form for narrative comments, O'Hara began, "Attractive, very intelligent attorney."

When Mann strongly protested his numerical ratings of her, O'Hara laughed and told her they did not matter; Barnard, he said, had told the Division heads that this evaluation go-around was only a practice run and that "they won't be used for anything." The Division heads were to perform *real* evaluations six months later, he said Barnard had told them. Then, he said, Mann's evaluations would be "better." He also said, three times during their conference about the evaluations, "Beverly, I think you're very attractive." In another instance, he told her that she insulted him by talking with him only about her cases. He repeatedly told her that she had "no humility" and, in acknowledging this in his trial and deposition testimony, he said he thought Mann "should

be more humble."

There was no formal mechanism by which to protest the accuracy of the 1983 evaluations, but, at Mann's request, she met with Barnard and did protest the accuracy of O'Hara's evaluations of her. Barnard promised to speak with O'Hara about them and to apprise Mann of the result of the meeting. When three weeks later Mann had heard nothing further, she drafted a two-page letter of complaint and delivered it to Barnard's office.

Barnard testified that she never followed up on Mann's complaint and that she simply forwarded the evaluation to Montgomery for placement in Mann's personnel file. Barnard also acknowledged that she had received and read Mann's letter. She said she simply placed the letter into Mann's personnel file and did not show it to Montgomery.

In the fall of 1983, the City Counsel placed a hiring freeze upon the Law Department, yet Barnard was interviewing attorneys for prospective job openings. In early 1984, she began hiring attorneys and placing them in various Law Department divisions such as Traffic Court and Municipal Ordinance enforcement, considered undesirable, with the stated promise that their initial Division placement would be temporary; they would be transferred into the Torts Division or the Civil Rights Litigation Division as soon as openings were available so that they could get the trial experience they sought.

In February, 1984, Mann agreed to substitute for an office friend as trial counsel in a trial to begin that morning; the friend had arranged to take vacation time that week in order to address a personal matter, and the office had failed to inform the court. Mann read the plaintiff's deposition that morning for the first time while an assistant, also utterly unfamiliar with the case, participated in jury selection. Then the two of them, with Mann as lead counsel, won the trial against an attorney who had tried many cases against the City over a period of many years and had never before lost.

The second round of job performance evaluations occurred in July, 1984. This time, O'Hara defamed Mann only in the "Personal Characteristics" categories, rating her highly in the "job duties" categories. His narrative began, "Attorney is bright. A good legal mind."

At Mann's request, she met with Montgomery. She told him what she had earlier told Barnard orally and in writing, and provided further detail. She also told him about her October, 1983, meeting with, and letter to, Barnard. He said he was unaware of any of it. Mann handed him a five-page document she had drafted detailing her record of case results and summarizing her arguments in a sampling of them. He said he would read the document after the meeting.

Montgomery arranged a meeting with O'Hara and Mann. After only a few minutes, the meeting was interrupted by some emergency and ended abruptly. They scheduled another meeting for a few days later, but that meeting was cancelled and not rescheduled. Three weeks later, on September 4, 1984, Barnard told Mann she had been fired; Barnard did not know the reason, she said. But without Montgomery's knowledge, Barnard placed an "Exit Interview Report" form in Mann's personnel file stating that Mann was "involuntary terminated" for "inadequate performance of duties."

Montgomery testified that he discharged Mann because of the two sets of performance evaluations. He described Mann as "intelligent" and "articulate" but characterized her statements to him about O'Hara as "bitching." Asked whether he had inquired into whether Mann "had good reason to bitch," he said he had not; he "already knew she had good reason to bitch," he said, because he knew O'Hara's evaluations were not accurate. He also testified that he had read the five-page document Mann had handed him when they met, and that he thought it reflected excellent results.

Montgomery also testified that he pressured at least one Law Department division head to provide a poor job performance evaluation for a particular attorney in order to

provide a basis upon which to discharge the attorney. Both he and Barnard admitted that they needed openings in the Torts Division. And Montgomery acknowledged that he was quoted accurately as follows in an article published in the Chicago Tribune in early 1986 shortly after he resigned as corporation counsel:

> You engage people who are known to you, whose confidence is known to you. I don't know that it would really be a wise thing for any politician to hire people who are not in any way aligned politically to him. That would be suicide.

After Mann was told she was discharged, she immediately retained counsel, who, upon threat of a lawsuit, negotiated a settlement. Mann did not request and did not receive any financial payment; she received only an agreement that Montgomery himself would respond to all inquiries about Mann from prospective employers and would limit his comments to statements contained in a draft reference letter to be signed by him. The agreement called for Mann to draft the letter, but when she did not produce the letter by the following week, Barnard drafted one and had it delivered to her attorneys' office. The letter praised Mann highly. Barnard testified that its contents were "factually" accurate.

Mann, for her part, agreed *only* that she would not file a lawsuit as long as the defendants complied with the agreement's terms; the contract included no waiver of tort damages if the defendants breached the agreement and defamed her or tortiously interfered with her prospective economic advantage. Mann paid her lawyers more than $3,500 to negotiate the non-financial agreement.

Montgomery testified that he never complied with the agreement; he simply had the phone inquiries referred to Barnard. In response to an inquiry from an attorney at the office United States Trustee in Bankruptcy in Chicago, where Mann had been offered a job pending a reference check and FBI background check, Barnard said there was an agreement between Mann and the City that prohibited Barnard from

discussing Mann with him but that "sometimes silence speaks a mouthful." The job offer was rescinded. Barnard in her testimony characterized the statement as "indiscreet." The attorney to whom she made the comment testified that the comment shocked him. The head of the Justice Department's Bankruptcy Division testified that the comment cost Mann the job.

Mann resumed her job search, eventually mailing more than 200 resumes and interviewing with 44 prospective employers. She was tentatively offered several jobs, but each time the offer was rescinded in a perfunctory phone call or letter. After 20 months, she ended her search. For a year beginning in January, 1988, she practiced law solo, working from her home. She has not practiced law since then.

Mann filed this lawsuit in the wake of the "silence speaks a mouthful" incident. The lawsuit, brought largely by virtue of 42 U.S.C. § 1983, alleged violation of the First Amendment right to free association, violation of the Fourteenth Amendment's right to substantive due process of law, violation of the Fourteenth Amendments' right to equal protection of the law, violation of 42 U.S.C. § 2000e *et seq.*, common law defamation, common law tortious interference with prospective economic advantage, and breach of severance agreement.

The case was assigned to District Judge James B. Moran, who repeatedly, including twice in Mann's presence, instructed the defendants' counsel to file a dispositive motion. Mann each time responded by filing a more detailed amended complaint, ultimately a 48-page one with 16 exhibits. The judge then issued the series of 1986 memorandum orders identified above. (See Apps. K, J and I.) Those orders, which dismissed several counts but not the entire complaint, state that employment blacklisting by government officials does not constitute a violation of the Fourteenth Amendment and that Mann's detailed complaint and exhibits failed to establish pretext or defamatory inaccuracy by the defendants.

Two years later, that judge recused himself when Mann learned that he and defendant Barnard, through a series of marriages and divorces, shared four stepchildren who lived with the judge and his wife, and that Barnard and the judge saw each other regularly at family social events. (Barnard's husband and the judge had been neighbors a decade earlier and had swapped spouses. Each of the original couples had four children. Barnard married her husband in 1983 after he and the judge's first wife divorced.)

The case then was assigned to a judge who stated that the case was an inappropriate one for summary judgment because it was replete with factual controversies. (See App. O.) Shortly afterward, it was reassigned again, to a newly confirmed judge.

The procedural history thereafter is reflected in the unpublished orders cited above. In essence, though, summary judgments were entered on August 13, 1991, on all civil rights counts triable to a jury that were not dismissed in the 1986 memorandum orders. (See App. H.)[1] Of particular significance to the issues presented in this Petition's section pertaining to the Fourteen Amendment (pp. 27-29), summary judgment also was entered in favor of the City of Chicago on the defamation count by virtue of immunity conferred by 745 ILCS 10/2-107, quoted above. That statutory subsection reads, "A local public entity is not liable for injury caused by any action of its employees that is libelous or slanderous."

The common-law defamation, tortious interference and breach of severance agreement counts against defendants O'Hara, Barnard and Montgomery were tried to a jury in the fall of 1991. The jury awarded Mann approximately $72,000 on her tortious interference count and approximately $68,000 on her breach of severance agreement count. They resolved the defamation count in favor of the defendants.

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[1] The August 13, 1991, order provided no explanation for the summary judgments. Before briefing in the first set of appeals, a motions panel remanded the case for explanation, the result of which appears at App. H.

On cross-appeal, the summary judgments and the Rule 12(b)(6) dismissal of the due process count were affirmed without comment. The defamation and tortious interference counts were remanded for retrial upon a finding of inappropriate instruction to the jury concerning the definition of the term "actual malice" as Illinois law defines it for the respective torts. The breach of severance agreement verdict was affirmed. (See App. D.)

The defendants had argued, extensively, in the cross-appeals that there was insufficient evidence to support a jury finding of actual malice as the Illinois Supreme Court has defined the term for the respective torts. The appellate court in remanding the counts for retrial rejected the argument with respect to both of the counts.

Nonetheless, in July, 1997, twelve and one-half years after the case was filed and 18 months after remand for retrial on the defamation and tortious interference counts, the defendants filed another summary judgment motion. *The motion reasserted virtually every argument in their pre-appeal summary judgment motion and in their briefs on appeal,* including a claim that the jury award on the breach-of-severance-agreement claim is duplicative of recovery in tort. It also for the first time asserted additional affirmative defenses that were available, if at all, all along. The defendants had not obtained leave, as per Fed. R. Civ. P. 8(c), to assert the defenses. See *Harris v. Secretary, U.S. Dept. of Veterans Affairs*, 126 F.3d 339 (D.C. Cir. 1997).

The summary judgment motion nevertheless was granted on both remanded counts. Mann moved for reconsideration, not only of those summary judgments but also of the ones entered in 1992 in light of newly issued authority of this Court and in light of a reversal of a key position of fact by the defendants: In written argument in support of their recent summary judgment motion, they admitted that their conduct indeed occurred in determining governmental policy – an admission necessary to their claim of statutory tort immunity but also an admission that reversed their earlier assertion of fact upon which they had obtained the summary judgments

entered on three civil rights counts in August, 1991. The district court on May 5, 1998, issued a memorandum opinion and order denying Mann's motion.

The July 14, 1999, unpublished order of the appellate court affirmed all of the summary judgments, most of them without comment. That order also affirmed without comment a minute order entered on June 8, 1998, that denied a motion brought by Mann pursuant to Federal Rule of Civil Procedure 60(b) for reconsideration of the 1986 dismissal of her substantive Due Process count. She had filed the motion on May 28, 1998, in light of *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), issued two days earlier, and in light of the district court's March 13, 1998, finding in this case that Illinois' Local Governmental and Governmental Employees Tort Immunity Act accords the defendants absolute immunity for the state-law torts alleged. The June 8, 1998, minute order stated only that the Rule 60(b) motion was untimely filed; it did not address the merits of the Due Process claim. (See App. K.)

The July 14, 1999, order also *directly* reaffirmed, without explanation, the 1986 dismissal of the Due Process count; on May 28, 1998, less than 30 days after the district court denied her motion for reconsideration of the March 13, 1998, summary judgments, Mann had filed an additional notice of appeal to enable her to again appeal *directly* from the 1986 dismissal of that count in light of *County of Sacramento* and the new circumstance in her case. (See App. L.)

REASONS WHY THE WRIT SHOULD BE GRANTED

I. FIFTH AMENDMENT DUE PROCESS (AND EQUAL PROTECTION), AND THE SEVENTH AMENDMENT RIGHT TO JURY DETERMINATION OF FACT IN COMMON LAW CLAIMS

This Petition asks this Court to elevate the recognized legal significance of conflicts between a single circuit's published and unpublished law to the status accorded conflicts

in the published law among the various circuits, particularly when the device of unpublished order has enabled the deliberate failure by the court to apply settled published law in a particular case. Certainly as a practical matter, the importance of the former is no less than that of the latter, and, in a significant respect, it actually is greater. In Mann's case, she *relied upon* the published law of her circuit and of her state, and upon the supposed constitutional guarantees of due process and equal protection of that published law, and has paid dearly for it.

Phrased differently, the seminal issue is whether due process and equal protection of the law are, after all, guarantees or are instead mere suggestions to be accepted or rejected by appellate courts as they please. The issue concerns the very meaning of law itself. A divergence between the published and unpublished law of a single circuit is as much a denial of due process of law and its equal protection component as is a conflict of law among the circuits.

Mann asks this Court to state a rule of law that is simple in both concept and application: If the particular appeal would have been resolved differently had the court been required to publish the result and the pertinent substantive facts or procedural history, that resolution of the appeal unconstitutionally denies due process and equal protection of the law. Absent such a rule of law, the appellate rules permitting the secret, private court resolution of appeals create a legal loophole that breaches the promise of due process and equal protection, a loophole for the courts that, unlike others, cannot even be discerned from reading the published law.

This Court has said so often, e.g., in *Albright v. Oliver*, 114 S. Ct. 807 (1994); *County of Sacramento v. Lewis*, *supra.*, that the essence of the constitutional guarantee of due process of law is the circumscription of the arbitrary exercise of the powers of government against the individual. This Petition presents the civil-law equivalent of the issues this Court is hearing this term in *Fiore v. White*, No. 98-942 (intermediate opinion issued Nov. 30, 1999). See, also, *Teague v. Lane*, 489 U.S. 288 (1989).

The decision by an appellate panel to resolve a particular appeal by unpublished order is, as this case demonstrates, utterly arbitrary, notwithstanding the guidelines stated in the circuit rule permitting unpublished appellate resolution, thus the failure to apply settled law to a particular case by virtue of that device is, in turn, utterly arbitrary.

The order issued in Mann's appeals, although short, is replete with neon signs advertising the court's unabashed ignorance of the specifics of this lawsuit and the arguments presented in the appeal. One sign is the order's erroneous characterization of the operative complaint as alleging willful and wanton misconduct rather than deliberate misconduct. Another is the erroneous statement that that court's order resolving the initial set of appeals had discussed the evidentiary record in the case. Another is the order's *two* references to key defendant Jayne Barnard as "he." And another is the order's erroneous statement that Mann did not allege the publication of statements not found in her personnel file; the sentence, "Sometimes silence speaks a mouthful," appeared nowhere in Mann's personnel file.

Most startling, the order suggests that the court did not even know *the chronology of the earlier set of appeals in relation to the trial in the case and the filing and resolution of the earlier summary judgment motion* – the one filed and resolved *before* the first set of appeals.

Two of the panel members passed through *two* appeals in her case so utterly disengaged from the facts and allegations in it that they did not even know the gender of a key defendant. The contents of the order, other than its bottom line, didn't concern them. Had the order referred to Mann as a monkey, they would have signed onto that, too.

Mann was entitled to genuine appellate review but, courtesy of that court's Rule 53(c), received instead a sort of parody of it. Worse, the reason for the *faux* appellate review in her appeals appears to have been more an invidious one than a purely arbitrary one: She appeared before that court as a civil appellant *pro se*. The secret, anonymous nature of unpublished *per curium* orders removed any consequence to the

reputations of the panel members from the contents of the order and any consequence to *stare decisis*; no one important would know of it and *stare decisis* would not change, thus the panel was free to engage in a wholesale disregard of settled law, and that is what it did.

The effect is dramatic. In Mann's case, the list of pertinent settled law – federal and state, procedural and substantive – that the court so easily ignored is remarkably extensive. It is recited below.

A. THE DISTINCTION BETWEEN THE LAW OF EMPLOYMENT-RELATED DEFAMATION AND TORTIOUS INTERFERENCE, ON THE ONE HAND, AND THE LAW OF WRONGFUL DISCHARGE, ON THE OTHER.

In its January 19, 1996, remand order, the appellate court had relied largely upon two Illinois Supreme Court opinions, *Mittelman v. Witous,* 552 N.E.2d 973, 135 Ill. 2d 220 (1989), and *Fellhauer v. City of Geneva*, 568 N.E.2d 870, 142 Ill. 2d 495 (1991), as had the district court in denying summary judgment on the defamation and tortious interference counts. *Mittelman* and *Fellhauer* define the term "actual malice" as it pertains respectively to defamation and tortious interference counts brought under Illinois law. For defamation, it is knowledge that the statement is false or a reckless disregard for its truth. For tortious interference, it is intent to harm or knowledge that the conduct is wrongful. It is, then, wrongful *intent*.

The defendants in Mann's case had argued both in their response to Mann's appeal on the defamation count and in support of their own appeal on the tortious inference count – as had the defendants in *Mittelman* and *Fellhauer* – that employment defamation and tortious interference allegations really were at-will employment wrongful discharge allegations and should be analyzed as such. The Illinois Supreme Court and, in turn, the appellate court earlier in Mann's case, *rejected* that argument. *Mittelman* states:

> It is certainly not in the best interest of the corporation to receive false information regarding one of its employees, even if that employee is ultimately responsible for a major corporate loss; nor is it in the best interest of the corporation for one who is responsible for such a loss to vindicate himself by unjustly imputing fault to another.[2] If Witous failed to act in the corporate interest, he cannot reasonably claim that he acted on behalf of the corporation. *Thus, he and the corporation are not one and the same for purposes of tortious interference analysis.* [Emphasis added.]
>
> Moreover, given the allegations of Mittelman's complaint, Witous employed "wrongful means" in dealing with the corporation and Mittelman. The defamation and tortious interference counts are analytically intertwined in our view. *Defamatory statements may, in themselves, give rise to a cause of action for libel or slander and, at the same time, become the means by which the tortious interference with contractual relationships or prospective economic advantage is committed....* If Witous slandered Mittelman, and ultimately cost Mittelman his job, as Mittelman alleges in his per quod count, that independent wrong constituted "wrongful means" within the meaning of the Restatement and, if Witous is found to have possessed the requisite intent... he improperly interfered with Mittelman's prospective business relationship. [Emphasis added.]

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[2] The portion of this sentence that appears before the comma originated *verbatim* with Mann. Mann was aware in the fall of 1988 that the Illinois Supreme Court had agreed to hear the case and that the resulting opinion would profoundly effect the law pertinent to her own lawsuit. She contacted Robert Mittelman, an attorney handling the appeal *pro se*, and offered her assistance in developing the arguments for his brief.

It was Mann who devised the argument summed up by the last sentence of that paragraph, the sentence that reads, "Thus, [the defendant supervisor] and the corporation are not one and the same for purposes of tortious interference analysis," and it was she who wrote the sentence, "It is certainly not in the best interest of the corporation to receive false information regarding one of its employees," adopted by the court *verbatim* from the brief.

This Court in *Haddle v. Garrison*, 119 S. Ct. 489 (1998), noted the distinction between the law of employment-related defamation and tortious interference, on the one hand, and the law of wrongful discharge, on the other. Illinois' law provides no exception to that rule of law.

B. THE LAUNDRY LIST

One newly raised defense was a section of Illinois' Local Government and Government Employees Tort Immunity Act, 745 ILCS § 10/2-201. That statutory subsection, enacted decades earlier, had not been amended since the inception of this lawsuit, but the defendants argued that an Illinois Supreme Court opinion issued in February, 1997, *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), interpreted § 10/2-201 as barring recovery in tort for willful and wanton misconduct.

The district judge in granting the summary judgments upon that defense acknowledged that the defense was available earlier but said he was allowing it anyway because the Illinois Supreme Court had only just found the statutory subsection applicable to willful and wanton misconduct. (See App. E.) The memorandum opinion also said:

> *Plaintiff is correct that the evidence cited by Defendants on remand is not substantially different from the facts already decided in this case. Nemmers*, 870 F.2d at 428.... Because we have granted the motion for summary judgment *due to the change in Illinois law*, Plaintiff need not submit a [Local Rule 12(n) statement submitting fact evidence in response to the summary judgment motion].

When in her motion for reconsideration, Mann noted that her allegations were not of willful and wanton misconduct but of deliberate injury, the judge ruled, notwithstanding the absence of any Illinois opinion so holding, that the statute applied to deliberately injurious conduct, as well.

When, in that motion, Mann quoted from Illinois Supreme Court authority issued three weeks before the entry of the summary judgments in Mann's case (of which the judge had been immediately apprised), stating expressly that a prerequisite to immunity under the statutory subsection was a finding that the injury at issue had occurred from "an act or omission in determining policy," and that the defendants earlier had obtained summary judgment and appellate affirmance on civil rights counts upon their assertion that their conduct did *not* arise from government policy, the judge, without explanation or reference to the evidentiary record, suddenly found that the defendants *had decided to "objectively evaluate Mann's performance"* and that the defendants were employees whose positions involved either making policy or making discretionary decisions, thus statutory subsection conferred immunity upon their conduct.

The judge found no factual inquiry necessary and certainly did not conduct one; the issues of fact, he found, were to be determined instead by operation of 745 ILCS § 10/2-201. No need, he found, for consideration of the evidentiary record developed during years of discovery conducted in the litigation, which by then had cost Mann more than $180,000 – much of it in borrowed money, much of it the proceeds of sales of blue-chip securities that had been in her family for three generations until they were sold in the late 1980s to pay her several-thousand-dollar-a-month legal fees at the time.

No, it was the Tort Immunity Act that, after all, determined what had been the seminal issue of fact in the case since it was filed in 1984; i.e., the defendants' motive(s) for their conduct, the court said. The defendants had decided to objectively evaluate Mann's job performance; the immunity statute *required* this finding of fact, the district judge said and so did the appellate court, which parroted the district judge's statement *verbatim* without elaboration.

On appeal, Mann asserted the implausibility of, and utter lack of foundation for, an interpretation of the statute as creating an irrebuttable presumption of *fact* concerning the

motive of the defendants, and argued that such an interpretation in any event renders the application constitutionally impermissible. But the appellate court found these arguments items on "a laundry list unworthy of any discussion" and, without prefatory explanation, stated as its final paragraph that it was affirming the summary judgments "[s]ince the defendants' decisions to objectively evaluate Mann's performance were made by employees whose positions involved either making policy or making discretionary decisions, and the acts or omissions by the defendants were both discretionary and involved in policy making decisions ..."

"In her most recent appeal," the court's order reads, "Mann raises a laundry list of issues; however, the only one worthy of any discussion is whether the defendants actions are shielded from liability under the Illinois Tort Immunity Act." This patronization, intended to imply that the lawsuit itself was frivolous and that Mann had quite some nerve in bothering the court with it a second time, failed to note that the earlier appeals were not just Mann's but also were the defendants, and that the defendants *lost* on *their* arguments that Mann's defamation and tortious interference counts failed to state a claim and that, in any event, her claim was not supported by the evidentiary record. The panel used this expedient to falsely imply its knowledge of the contents of the briefs.

The appellees in Mann's case had waited twelve and one-half years to raise a statutory immunity defense that one of them, the City of Chicago, routinely asserts as a defense in tort cases and had asserted from the beginning more than five years earlier in the *In re Chicago Flood Litigation* case. *No Illinois opinion had ever held the statute applicable to the types of torts Mann was alleging*, and the only opinion to even address the issue, *Stratman v. Brent*, 683 N.E.2d 951 (Ill. Ct. App. 1997), had held that it did not (discussed below). The defendants were basing their motion on a reversal of a position upon which they had obtained earlier summary judgments. Yet Mann shouldn't have bothered the appellate court with her appeal. Not as a *pro se*, anyway.

On November 16, 1999, Mann filed a motion to recall the mandate and for clarification of the court's enigmatic order. On November 29, 1999, the day that Mann's motion to recall the mandate was denied, the court certified a question to the Illinois Supreme Court pertaining to interpretation of a section of the Illinois Tort Immunity Act. See *Yang v. City of Chicago*, Nos. 98-4238 and 98-4330 (7th Cir. 1999). Mann had requested in her petition for rehearing that the court do that in her case. Judge William Bauer, a panel member in Mann's appeals, authored *Yang*, in which Judge Frank Easterbrook, the presiding panel member in Mann's appeals, concurred. That opinion quotes Circuit Rule 52 and Illinois Supreme Court Rule 20(a), each quoted above.

In her petition for rehearing. Mann also had argued to the district court that the defendants earlier had obtained summary judgments and appellate affirmance of those summary judgments in Mann's civil rights counts partly upon their assertion that the conduct at issue did *not* constitute government policy and was committed in the determination of government policy. The defendants were bound by their statement or, alternatively, the summary judgments entered upon the basis of that statement must be reversed.

But the district judge found that the "standard," as he called it, for determining government policy under state law differs from that under federal civil rights law. He did not address *St. Louis v. Praprotnick*, 485 U.S. 112 (1988), and *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989), although Mann referenced those opinions extensively.

On appeal, Mann emphasized the issue. The title of a section of her opening appellate brief read, "Parties are Not Entitled to Make *Sequential* Assertions of Fact and Law that *Directly Contradict* One Another, When the Earlier Assertions Supported Earlier Rulings or Findings of Fact that Resolved Substantive Issues." [Emphasis in original.]

But the court found this another item on the laundry list unworthy of its discussion, this although 16 days earlier, Judges Easterbrook and Bauer had specifically *disallowed* inconsistent positions argued sequentially in successive

appeals. Then Judge Easterbrook, writing for the court, said, "*Too late. Petitioners could choose one side of the required/forbidden line, and they might have been entitled to argue inconsistent positions simultaneously, but they can't present them in sequence.*" [Emphasis added.] See *DeSilva v. DiLeonardi*, No. 99-1754 (7th Cir. Jun. 28, 1999). See, also, *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999), in which Judge Bauer, a panel member in *both* sets of appeals in Mann's case, concurred.

Two days after the mandate was issued in Mann's appeals, Judge Easterbrook, writing in *Neal v. Honeywell, Inc.*, Nos. 98-1728 and 98-3162 (7th Cir. Sept. 15, 1999), for a panel that included Judge Kenneth Ripple, the third panel member in Mann's appeals, said:

> [Appellant] *Honeywell's current position contradicts the premise of its interlocutory appeal in 1994 and would make that interlocutory review superfluous. This is something in which the judicial system is vitally interested even if [appellee] Neal no longer cares. Her failure to stand on a procedural objection therefore is not dispositive. Sometimes the judiciary must act in self-defense. ... By seeking permission to appeal under sec. 1292(b), therefore, Honeywell was representing that these conditions were satisfied... After receiving permission to take such an appeal and losing, a party cannot contend that the answer is irrelevant.* If Honeywell is right now, then it was wrong to appeal in 1994..... *To persuade us to hear the interlocutory appeal, Honeywell told us that the case turned on the difference between the five- and six-year periods. We picked six, which resolves the limitations dispute.* [Emphasis added.]

Neal was argued on May 17, 1999, three weeks after Mann's appeals were argued. In Mann's case, though, the court relegated the first set of appeals to the status of a mere practice run regarding the defendants' (but not Mann's) arguments.

Other items on the laundry list that the court deemed unworthy of its discussion: the application of the doctrines of the law of the case and waiver to this fourteen-year-long lawsuit after first trial, after earlier summary judgments, after earlier appeal; the propriety of mutually exclusive summary judgments entered at different times upon respectively conflicting assertions of fact; the substantive due process claim as per *County of Sacramento*, *supra.*; the propriety under Illinois law of treating employment defamation and tortious interference as at-will employment wrongful discharge counts; the inapplicability of 745 ILCS § 10/2-201 to deliberately injurious (or bad faith) conduct; the inapplicability of 745 ILCS § 10/2-201 to activities not unique to government entities, as per extensive Illinois common law.

The district judge repeatedly and insistently had pressured Mann to accept a small settlement offer because of the age of the litigation and because, he said, she was spending too much time on it; she should be using her "talent" as a "bright, capable person" to practice law on behalf of clients who would pay her, he said. See Apps. M and N; e.g.:

> This is dogging your life. You know, I could see maybe suing the City, but you have a life besides that. I mean, come on. We spent some time together. Why are you letting your talent sit aside? You know, really somebody -- at some point someone has got to say this to you." (See transcript at App. M.)

At another hearing, he said he thinks about Mann's case when he is driving in his car. His conclusion: She should accept whatever was offered in settlement so that she could spend her time doing other things. And at a hearing shortly after he entered the summary judgments but before he ruled on Mann's motion for reconsideration, he again pressured her to accept whatever settlement offer was made. (See App. N.)

That judge predicted accurately that as a *pro se* appellant in a civil lawsuit, Mann would receive only rubber-stamp appellate review of his rulings, so he did what suited his convenience. There is an inverse correlation between the likelihood of genuine appellate review and the need for it.

C. THE DOCTRINES OF LAW OF THE CASE AND WAIVER

Mann's research has disclosed nearly 60 opinions of that court published with the last five years that recite with unremitting consistency the doctrines of law of the case and waiver. See, e.g.; *Vidimos, Inc. v. Wysong Laser Co., Inc.*, No. 99-1159 (7th Cir. Jun. 14, 1999); *Benson v. S.I. Handling Systems, et al.*, 99-2700 (7th Cir. Aug. 12, 1999); *Avitia v. Metropolitan Club*, 49 F.3d 1219 (7th Cir. 1995); *People Who Care v. Rockford Board of Education*, 171 F.3d 1083 (7th Cir. 1999); *Neal v. Honeywell, Inc., supra.*; *Britton v. Swift Transportation Co.*, 98-2492 (7th Cir. Aug. 8, 1999); *Carr v. O'Leary*, 167 F.3d 1124 (7th Cir. 1999); *Leavell v. Keiffer*, No. 98-4089 (7th Cir. Aug. 19, 1999).

And that court did not only just five years ago adopt these doctrines as the law of the circuit. See, e.g.; *Nemmers v. USA*, 870 F.2d 426 (7th Cir. 1989); *Evans v. City of Chicago*, 873 F.2d 1007 (7th Cir. 1989); *Barrington Press, Inc. v. Morey*, 816 F.2d 341 (7th Cir. 1987); *Soderbeck v. Burnett County, Wis.*, 821 F.2d 446 (7th Cir. 1987).

As *Nemmers* phrased the doctrine of law of the case, every holding in an appellate remand opinion or order becomes the law of the case, and the court will not reconsider the holding "without a showing that either the evidence considered on remand was substantially different, or controlling authority has since changed ..., or the previous decision was 'clearly erroneous, and would work a substantial injustice' [citations omitted]." This Court phrased it similarly in *Agostini v. Felton*, 521 U.S. 203, 236 (1997), an opinion cited often by the Seventh Circuit court of appeals.

A month before it issued its order in Mann's appeals, that court wrote, in *Vidimos, Inc. v. Wysong Laser, supra.*:

> This appeal is founded on a misunderstanding of the doctrine of law of the case.... Wysong has appealed, represented by new counsel who challenge two rulings in our previous opinion that proved decisive in the award of damages and prejudgment interest to the plaintiff on remand.... *But that is the*

> *sort of argument that the law of the case doctrine bars--namely, an argument for reconsideration that is based not on intervening authority, new (and heretofore undiscoverable) evidence, or other changed circumstances that justify waiver of the doctrine*, e.g., [citations omitted], *but on considerations of fact or law that were available when the previous appeal was argued.... The remedy of a losing party who believes that through oversight or impulsiveness the court has erred is to seek rehearing – which Wysong did not do – rather than to lie in wait and then, years later (two and a half years, to be precise), having lost on remand, to present its argument for reconsideration in a second appeal.* [Citations omitted.] [S]uch a litigating strategy ... *will not be allowed to succeed.* [Emphasis added.]

There is no *published opinion* of that court that defies the doctrines of law of the case and waiver, at least not in a manner sufficiently obvious to effectuate an alteration of the law by virtue of the publication of the opinion.

A staple of that court's opinions is an acknowledgement of the reliance that plaintiffs and contingent-fee counsel place upon the application of the doctrines of law of the case and waiver to their own case in calculating the value of pursuing the litigation; e.g., *Carr v. O'Leary, supra.; Vidimos.* The order in Mann's case, on the other hand, ordered her to pay the appellees' costs in the successive appeal that relitigated *de novo* the issues determined in her favor in the initial cross-appeals. (She did not pay the costs, but only because the appellees did not submit a bill of costs.)

Every single member of the *en banc* court, and the senior judge who was a member of the panel in *both sets* of appeals in her case, has during the last five years authored or concurred in a published opinion that enunciates the doctrines of law of the case and waiver of claims and defenses. Yet, although the petition was pending for six weeks, *no* judge

voted to hear the case *en banc*.[3] Not even Chief Judge Richard Posner, who authored *Vidimos, supra.*, *Avitia, supra.*, *People Who Care, supra.*, *Carr v. O'Leary, supra.*, and several of the other similar ones, and who also had authored *Speakers of Sport, Inc. v. ProServ, Inc.*, 98-3113 (7th Cir. May 13, 1999), and *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999), both cited below.

Contrast this with the following statement authored by Judge Posner for the *en banc* court in *Newman-Green Inc. v. Alfonzo-Larrain R.*, 854 F.2d 916 (7th Cir. 1987), in which the court vacated a published opinion:

> We vacated the panel decision, and took the case en banc to decide whether a court of appeals is empowered to dismiss a party in order to retain federal jurisdiction. Previous decisions by this court had answered the question "no," but the panel disagreed and held that we may do this, 832 F.2d 417, 419-20 (7th Cir. 1987), and it went on to reverse the district court on the merits. The full court adheres to our previous decisions.

Mann's research has found no *en banc* review by that court of an order issued by virtue of (if not in actual compliance with the rule's own stated prerequisites) that court's Circuit Rule 53, and it appears that there exists an internal court policy that prohibits it from hearing, *en banc*, any appeal that was resolved by unpublished order – a policy premised upon a belief that unpublished resolution of appeals that deviate from universally established law do not actually alter the law and therefore are of no large importance.

It is, in other words, not the law's reality but its facade that matters to the *en banc* court – and the panel in Mann's appeals knew that. The public's ignorance is bliss, not for the public but for the members of the judiciary whose whim or

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[3] That court's internal operating procedure as published in its handbook and on its Web site allows the judges only 10 days after such a petition is distributed *en banc* in which to request a vote on it. Mann's petition remained pending for six weeks even though no judge requested a vote on it.

convenience is served by the license that Circuit Rule 53 provides them. The panel, in other words, could and did create its own exemption from any possible *en banc* oversight of its ruling and therefore from application of that circuit's law.

Such a policy *itself* fundamentally alters the law by effectively (albeit quietly) dismantling the Equal Protection component of the Fifth Amendment's Due Process Clause and perhaps the Due Process Clause itself. It licenses (and in Mann's case licensed) a brazen failure by the assigned appellate panel to apply the law whenever it is inconvenient for it to do so in a particular case.

Also, during the six-week pendency of her petition for rehearing with suggestion for rehearing *en banc*, Mann submitted several submissions pursuant to F.R.A.P. 28(j). Judge Easterbrook disallowed their filing, issuing orders stating that Rule 28(j) does not apply to such petitions. (See App. P.) But that court did allow three such filings during the pendency of a petition for rehearing with suggestion for rehearing en banc last spring, in *LaGuerre v. Reno* (7th Cir. No. 98-1954), an interpretation of Rule 28(j) that gives effect to its purpose: consistency in application of the law.[4]

D. THE DISTINCTION BETWEEN DAMAGES FOR TORT AND FOR BREACH OF CONTRACT UNDER ILLINOIS LAW

Also in the earlier set of appeals in Mann's case, the defendants had argued that Mann's tort damages were duplicative of the small award she had won on her breach of contract count, an award thoroughly circumscribed by the limits of contract law and by various rulings during the trial, including one that barred her from providing expert testimony about prospective financial injury, rulings that Mann had challenged in that appeal. In remanding the two counts for

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[4] The panel, or at least its presiding judge, also denied an instanter motion that Mann filed 12 days after the issuance of the July 14, 1999, order for leave to supplement the appendix to her petition with a transcript of oral argument. Mann had filed the petition itself seven days early. See motion, transcript and order at App. Q.

retrial, the court had ruled *against* the defendants on this issue and had reopened the damages issue for the second trial before a different judge.

No matter. Unlike in the other cases, the court's earlier *rejection* of the cross-appellants' earlier assertions was – well, not *quite* short-lived, but three and one-half years long.

The court's amorphous order does not even explain the basis for its single-sentence finding that tort damages for the defamation would be duplicative of the damages for breach of contract, a finding not contained in the district court's orders; it does not even say whether this was intended as a statement of law or, rather, as a finding of fact, either on the basis of a waiver provision it believed was in the contract or upon a calculation by the court of Mann's damages.

The award actually amounted to about one-third of her out-of-pocket expenses to litigate the case.

The court's legal premise, if that is what it is, is patently ridiculous in light of actual Illinois law. See, e.g., *Speakers of Sport, Inc. v. ProServ, Inc.*, No. 98-3113 (7th Cir. May 5, 1999), citing to *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 370-71 (Ill. 1998); *J.D. Edwards & Co. v. Podany*, 168 F.3d 1020 (7th Cir. 1999). But Mann is not certain that that is what it is – that is, that the court intended it as a premise of *law*. In *Neal, supra.*, Judge Easterbrook explained elaborately that Illinois law indeed allows for monetary compensation for "special" – i.e., *non-monetary* – injury resulting from the commission of a tort.

Perhaps the court was finding that it is not Illinois tort law, generally, but only Illinois *defamation law* that allows monetary recovery only for specifically proved dollar-for-dollar monetary loss. If so, the finding marks an epiphany for Judge Bauer. He had authored a lengthy opinion affirming a jury's $2 million judgment against the CBS network and a Chicago newscast anchor because, he explained, Illinois law allows substantial monetary tort damages for injury to business reputation *even absent tangible monetary loss*, as was the situation in that case. See *Brown & Williamson v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987).

E. THE PARAMETERS OF FIRST AMENDMENT PROTECTION FOR DEFAMATION

Nor does the court's order explain its finding that Barnard's "silence speaks a mouthful" comment, which cost Mann the job she was offered as an assistant United States trustee in bankruptcy, was "obviously" capable of innocent construction and therefore is not actionable in tort, a ruling not contained in the district court's orders. The order does not even state the obviously innocent construction. It may be obvious, but not to Mann, nor to Barnard, nor to the attorney to whom the statement was made, nor to anyone to whom it was reported.

Nor does it explain why, if the defense was so obviously available, *it was not raised until after remand for retrial twelve and one-half years after the lawsuit was filed.*

Nor does the order attempt to reconcile its statement of defamation law with that of *Milkovich v. Lorain Journal,* 497 U.S. 1 (1990). The order does not mention *Milkovich*, and ostensibly relies for its premise of law entirely upon an Illinois Supreme Court opinion, *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201 (Ill. 1992). But *Kolegas* expressly based *its* ruling for the *plaintiff* upon *Milkovich. Milkovich* states the breadth of First Amendment protection as "whether a reasonable factfinder could conclude that the statements ... imply [a defamatory assertion]," not whether the statements are *capable* of an innocent construction.

Kolegas was issued more than three years before the *first* set of appeals was resolved in Mann's case, and *she* cited it and *Milkovich* back then.

II. FOURTEENTH AMENDMENT DUE PROCESS AND EQUAL PROTECTION, AND THE SEVENTH AMENDMENT RIGHT TO JURY DETERMINATION OF FACT

Last, but certainly as it effects her personally, not least, Mann also asks this Court to consider whether a state statute found to mandate a judicial finding of *fact* in specific cases

violates the Fourteenth Amendment's due process clause and the Seventh Amendment's guarantee of *jury* determination of facts in lawsuits brought under the common law. Particularly, she asks this Court to consider the constitutionality of a statutorily imposed imprimatur by the court upon the accuracy or good faith of defamatory statements that have the inherent potential to destroy their victim's livelihood.

The appellate court, torturing the Illinois Supreme Court's opinion in *Harinek v. 161 North Clark St. Ltd. Partnership*, 181 Ill. 2d 335, 692 N.E.2d 1177 (Ill. 1998), found such a statutory mandate in Illinois' Tort Immunity Act, but it did not consider *the constitutionality* of that mandate. The mandated findings of fact, however, have profound implications for Mann. Because issues of state of mind, e.g., objectivity, motive, are virtually always considered issues for the trier of fact – a concept of law that even most lay adults know – any reader of the appellate court's order surely will interpret it as stating substantive findings of fact about Mann discerned from the evidentiary record. A day before Mann's Petition for Rehearing with Suggestion for Rehearing *en banc* was denied, that court, in *Wollin v. Gondert*, No. 98-1857 (7th Cir. Sep. 2, 1999), said "an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. *This is because evaluating intent would be a factual analysis*...." [Emphasis added.] See, also, Judge Easterbrook opinion, Judge Ripple concurring, in *Walker v. Nat'l Recovery, Inc.*, 99-2119 (7th Cir. Dec. 21, 1999), finding question of mental state an issue of fact, "not of law or logic."

The credibility of defenses to wrongful-discharge allegations and the accuracy of defamatory statements and the good faith, or lack of it, of the publishers of defamation are, in every state in this county and in federal law (e.g., whistleblower statutes; Title VII of 42 U.S.C. 2000e *et seq.*,) considered issues of fact, thus any reader of conclusory statements of fact by a court will presume that the court's determination was based upon a review of the evidentiary record. Yet in this case, the appellate court found not only a statutory

bar to legal redress for what can be a deliberate and deliberately devastating injury but also a statutory *invitation to commit the injury* if it is personally advantageous to do so. The statute *requires the court to resolve issues of fact in favor of defendants*, the court said.

This is (suffice it to say) a remarkable reach for a governmental immunity statute. It also constitutes a stark denial of the Fourteen Amendment's guarantee of due process of law at its most fundamental, particularly when those findings of fact read as *ad homonym* attacks upon the plaintiff. See *Albright v Oliver, supra.* And it operates as a denial of the Seventh Amendment's right to jury determination of facts in lawsuits brought under the common law.

Mann has never heard of a presumption of *fact* by operation of liability-immunity statute, and she doubts that anyone else but the members of that court has either. Certainly this is a novel construct of *Illinois* law; there is no published opinion of any Illinois court that finds such a presumption of *fact* by operation of that statute, or by operation of any other statute, best as Mann can tell.

Mann had argued extensively on appeal that the defendants' conduct constituted a denial of the type of substantive due process rights described by this Court in *County of Sacramento, supra.*, particularly given the suddenly recognized statutory immunity that eliminated consideration of *Parratt v. Taylor*, 451 U.S. 527 (1981); the first several sections of her opening appellate brief addressed this issue. Yet the court declined even to mention it. But seven months earlier, in *Payne v. Churchich*, 161 F.3d 1030 (7th Cir. 1998), Judge Ripple, in an opinion reversing the dismissal of a federal civil rights count that was granted "on the ground that [the defendants] enjoyed absolute immunity as a matter of state law under the Illinois Tort Immunity Act," wrote:

> Immunity on the federal claims, those brought pursuant to 42 U.S.C. sec. 1983 in this case, is a matter of federal law.... In the case before us ... the district court failed to consider whether the governmental defendants were liable or immune under federal law

> for their alleged federal constitutional violations. Therefore we cannot accept the district court's rationale for dismissing the claims....

The panel in Mann's appeals, by its default of discussion, did *exactly* what seven months earlier one of its members and two colleagues had reversed a district judge for doing: resolving a *federal* civil-rights substantive due process count by applying *state* statutory tort immunity. Elsewhere in *Churchich*, the panel had discussed the significant alteration in due process analysis mandated by *County of Sacramento*.

This issue is particularly significant given the court's idiosyncratic interpretation of *Stratman v. Brent, supra.* In contriving a distinction between *Stratman* and Mann's case, the court found *Stratman* to hold the immunity statute inapplicable only to the publication of defamatory statements *not contained in the plaintiff's personnel file*; to trigger the statutory immunity, the court's order suggests, the defendant in *Stratman* need only have first reduced the defamatory statements to writing and placed the writing into Stratman's employment record – a potently dangerous construct of law.

In December, 1999, Mann filed respective complaints pursuant to 28 U.S.C. § 372(c) against Judges Moran, Andersen and Easterbrook for their conduct as described above (and, against Judge Easterbrook for additional conduct). (App. Q.) Seventh Circuit Chief Judge Posner, on December 22, dismissed all of them as "directly related to the merits of a decision or procedural ruling," and stating that judicial misconduct, including conflict of interest, is mere "error" and thus is beyond the scope of that statute. (App. R.)

CONCLUSION

Judge Easterbrook, in reiterating a circuit rule that requires district judges to state their reasons whenever the judge "resolves any claim or counterclaim on the merits [or] terminates the litigation in its court," wrote, in *U.S. v. Mobley*, No. 99-1621 (7th Cir. Sept. 30, 1999), "Reasons are essential

to intelligent appellate review .... Giving reasons also contributes to intellectual discipline...." He illustrated:

> The decision concerning para. 23 was an easily preventable gaffe.... Because the district judge did not explain his decision, we can't tell whether he meant to delete a portion of a count, a step appealable under [citation omitted], or instead to foreclose mention of overt acts that occurred before 1993."

The judge's exemption of himself and his immediate colleagues from compliance with this dictate of logic seems to Mann the ultimate conceit -- and the ultimate acknowledgment that Mann indeed was denied procedural and perhaps substantive due process of law in her appeals. Had these judges exercised the intellectual discipline that they enforce upon district judges within their circuit, they might have recognized issues on Mann's laundry list that indeed were worthy of their discussion. There is a lot of dirty laundry in this litigation.

Mann spoke recently with this Court's chief deputy clerk, Francis Lorson, about the application of the Court's Rule 10(a) in actual practice, specifically whether the Court ever actually does grant certiorari petitions in civil cases upon the basis that "a United States court of appeals has ... so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." He said it does, but declined to offer ballpark statistics.

But if not in this case, then in what case? Mann asks this court to grant this Petition.

Respectfully submitted,

Beverly Mann
Petitioner *Pro se*

Supreme Court
F I L
No. 99 1103 DEC 30 1999
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BEVERLY B. MANN,

Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA and JAYNE W. BARNARD,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543-0001

WILLIAM K. SUTER
CLERK OF THE COURT

AREA CODE 202
479-3011

November 23, 1999

Ms. Beverly B. Mann
7261 North Campbell Avenue
Chicago, IL 60645

Re: Beverly B. Mann
v. City of Chicago, et al.
Application No. 99A432

Dear Ms. Mann:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on November 23, 1999, extended the time to and including January 1, 2000.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk

By

Loretta S. Ruffin
Assistant Clerk

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

September 3, 1999

Before

Hon. WILLIAM J. BAUER, Circuit Judge

Hon. FRANK H. EASTERBROOK, Circuit *Judge*

Hon. KENNETH F. RIPPLE, Circuit Judge

No. 98-1936, 98-2413 and 98-2797

BEVERLY B. MANN, States *Plaintiff-Appellant,*	Appeal from the United District Court for the Northern District of Illinois, Eastern Division
v.	No. 84 C 11020
THE CITY OF CHICAGO, etc., et al., *Defendants-Appellees.*	Wayne R. Andersen, *Judge.*

ORDER

On July 21, 1999, plaintiff-appellant filed a petition for rehearing with suggestion for rehearing *en banc. All* the

judges on the original panel have voted to deny the petition, and none of the active judges* has requested a vote on the suggestion for rehearing *en banc.* The petition is therefore DENIED.

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*The Honorable Ilana Diamond Rovner took no part in the consideration of the petition.

BEVERLY B. MANN, Plaintiff-Appellant, v. THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA, and JAYNE W. BARNARD, Defendants-Appellees.
Nos. 98-1936, 98-2413, and 98-2797
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
1999 U.S. App. LEXIS 16219

April 23, 1999, Argued
July 14, 1999, Decided
NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Rehearing Denied September 3, 1999, Reported at: 1999 U.S. App. LEXIS 21411.
Reported in Table Case Format at: 1999 U.S. App. LEXIS 24447.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 84 C 11020. Wayne R. Andersen, Judge.

DISPOSITION: AFFIRMED.

CORE TERMS: discretionary, Tort Immunity Act, omission, prospective employer, tortious interference, defamatory, immune, Illinois Tort Immunity Act, court ruled, ministerial, balancing, innocent, willful, shield, wanton, Governmental Employees Tort Immunity Act, prospective economic advantage, exercise of discretion, personnel, willfully, wantonly, serving

COUNSEL: BEVERLY B. MANN, Plaintiff - Appellant, Pro se, Chicago, IL USA.

For CITY OF CHICAGO, HAROLD J. WASHINGTON, JAMES MONTGOMERY, TIMOTHY O'HARA, JAYNE BARNARD, Defendants - Appellees: Brian L. Crowe, OFFICE OF THE CORPORATION COUNSEL, Chicago, IL USA.

For HAROLD J. WASHINGTON, JAMES MONTGOMERY, TIMOTHY O'HARA, JAYNE BARNARD, CITY OF CHICAGO, Defendants - Appellees: Mardell Nereim, OFFICE OF THE CORPORATION COUNSEL, Chicago, IL USA.

JUDGES: Before Hon. WILLIAM J. BAUER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION: ORDER

Beverly B. Mann appeals the district court's [*2] grant of summary judgment in favor of the defendants on her defamation claim and her tortious interference with contract and tortious interference with prospective economic advantage claim. Mann argues, *inter alia*, that the actions taken by the defendants that gave rise to the claims are not covered by Illinois' Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/2-201 ("Tort Immunity Act" or "the Act"). We affirm.

I.

As the district court noted in its Memorandum Order and Opinion, the facts of this case have already been discussed in

the numerous proceedings before the district court and this Court since the case's inception in 1984. Mann's claims arise from the defendants' conduct when she was fired from her position as an attorney with the City of Chicago's office of Corporation Counsel. In her most recent appeal, Mann raises a laundry list of issues; however, the only one worthy of any discussion is whether the defendants actions are shielded from liability under the Illinois Tort Immunity Act.

II.

The gist of Mann's claims is that the defendants prepared defamatory performance evaluations about her and that Jayne W. Barnard, Deputy Corporation [*3] Counsel in charge of personnel administration, made defamatory remarks about Mann's performance while employed at the City of Chicago to a prospective employer. Mann also claims that these statements, as well as the decision to fire her, were made willfully and wantonly. She further asserts that the actions taken by the individual defendants were neither discretionary nor made in determining any policy, and are thereby not covered by the Tort Immunity Act.

The Illinois Tort Immunity Act states, in pertinent part:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

745 ILCS 10/2-201. Until recently, it was unclear exactly which types of activities by government employees were immune from liability under the Act. However, in *Harinek v. 161 North Clark St. Ltd. Partnership*, 181 Ill. 2d 335, 692

N.E.2d 1177, 230 Ill. Dec. 11 (Ill. 1998), the Illinois Supreme Court clarified which employees and which actions or omissions are covered. In *Harinek*, [*4] the court held that the language of the statute makes clear that the scope of immunity depends upon both the type of position held by the government employee and the act or omission involved. *Id.* at 1181. In order for a government employee to be immune under the statute, "the employee's position. . . may be one which involves either determining policy or exercising discretion, but. . . the act or omission must be both a determination of policy and an exercise of discretion." *Id.* Furthermore, acts or omissions which are willful and wanton are also covered by the Act. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 680 N.E.2d 265, 273, 223 Ill. Dec. 532 (Ill. 1997). In this case, the type of position held by the defendants is not at issue. It is the individual acts of the defendants that are. Therefore, we must decide whether the acts in question were both discretionary and a determination of policy.

Illinois courts have made a distinction between acts that are discretionary, as opposed to those that are merely ministerial. In *Snyder v. Curran Township*, 167 Ill. 2d 466, 657 N.E.2d 988, 212 Ill. Dec. 643 (Ill. 1995), the appellate [*5] court held that:

> discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to themandate of legal authority, and without reference to the official's discretion as to the propriety of the act.

657 N.E.2d at 993. An act is a determination of policy under § 2-201 of the Tort Immunity Act if it requires the balancing

of competing interests and making a judgment call as to which solution would best serve each one of those interests. *Harinek*, 692 N.E.2d at 1181 (internal quotations omitted). Thus, if the acts complained of are both discretionary and involve making policy, the defendants are immune from liability under the Tort Immunity Act.

Mann is apparently urging this court to find that the defendants' actions were neither discretionary nor involved in determining policy. In support of her position, Mann relies on *Stratman v. Brent*, 291 Ill. App. 3d 123, 683 N.E.2d 951, 225 Ill. Dec. 448 (Ill. Ct. App. 1997). In that case, the Illinois appellate court ruled that a police chief was not exercising his [*6] official discretion when he told the plaintiff's prospective employers that the plaintiff, a former police officer, was unstable, displayed a negative attitude, refused counseling after he was involved in a fatal shooting, was nicknamed "Code Red" as an indication that he acted crazy, and that, as police chief, he would not rehire the plaintiff if he reapplied for a job. 683 N.E.2d at 953-54. The appellate court ruled that the plaintiff's injury arose from the police chief's decision regarding which statements he chose to provide and not the decision whether to provide information because the statements he provided were not contained in the plaintiff's employment file. *Id.* at 956.

However, *Stratman* is inapposite because it involves affirmative statements made to a prospective employer not contained in the plaintiff's employment file. Mann does not allege that Barnard made any affirmative statements to a prospective employer that were not contained in her employment file. The statement Mann refers to is one that Barnard made to a prospective employer after he said that he could not talk about Mann pursuant to an agreement the City had with her. Barnard then stated that "sometimes [*7] silence speaks a mouthful." Thus, Barnard only decided

whether to make comments to a prospective employer, which, as even *Stratman* states, is discretionary. *See Stratman*, 683 N.E.2d at 956. Furthermore, Illinois appellate courts have held that the hiring and firing of employees is inherently discretionary, within the meaning of § 2-201 of the Tort Immunity Act. *See Anderson v. Grayslake School Dist. No. 46*, 1997 U.S. Dist. LEXIS 15980, 1997 WL 639032 at *1 (Oct. 3, 1997); *Johnson v. Mers*, 279 Ill. App. 3d 372, 664 N.E.2d 668, 216 Ill. Dec. 31 (Ill. Ct. App. 1996). Therefore, it is clear that the City's decision to fire Mann was discretionary.

Nor are Barnard's statements defamatory *per se*, as alleged by Mann. A statement cannot be defamatory *per se* if it is reasonably capable of an innocent construction. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 607 N.E.2d 201, 206, 180 Ill. Dec. 307 (Ill. 1992). Here, there is no question that Barnard's statements can have an innocent construction. Furthermore, Mann has already received monetary damages for Barnard's statements under a breach of contract theory, *see Mann v. Montgomery*, 1998 U.S. Dist. LEXIS 3195, 1998 WL 122779 [*8] at *1 (March 16, 1998), and, therefore, any additional recovery would be duplicative.

In addition to being discretionary, the decision to prepare performance evaluations, and ultimately to discharge Mann was clearly a policy decision. In making his decision to fire Mann, James Montgomery, head of the City's Law Department, had to balance the interests of best serving the city in its legal representation, and most effectively running the office of Corporation Counsel with respect to its personnel decisions and building morale in the office. This balancing of interests squarely fits within the Illinois courts' definition of a policy making position under the language of § 2-201 of the Tort Immunity Act. *See Harinek*, 692 N.E.2d at 1181. Even if these decisions were made willfully and

wantonly, the Illinois Tort Immunity Act would still shield the defendants from liability. *See In re Chicago Flood Litigation*, 680 N.E.2d at 273 (provision in Tort Immunity Act does not contain an exception for willful and wanton conduct).

Since the defendants' decisions to objectively evaluate Mann's performance were made by employees whose positions involved either making [*9] policy or making discretionary decisions, and the acts or omissions by the defendants were both discretionary and involved in policy making decisions, the Local Governmental and Governmental Employees Tort Immunity Act shields the defendants from liability for defamation and tortious interference with contract and tortious interference with prospective economic advantage. We AFFIRM.

BEVERLY B. MANN, Plaintiff-Appellant, Cross-Appellee, v. CITY OF CHICAGO, et al., Defendants-Appellees, and CITY OF CHICAGO and JAMES MONTGOMERY, Cross-Appellants.

Nos. 92-3761, 92-3797
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT
1996 U.S. App. LEXIS 1669

March 30, 1995, Argued
January 19, 1996, Decided
NOTICE: [*1] RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Rehearing and Suggestion for Rehearing En Banc Denied March 19, 1996, Reported at: 1996 U.S. App. LEXIS 5006.

Reported in Table Case Format at: 74 F.3d 1242, 1996 U.S. App. LEXIS 39134.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 84 C 11020. George W. Lindberg, Judge.

DISPOSITION: AFFIRMED IN PART, VACATED IN PART, and REMANDED.

CORE TERMS: actual malice, tortious interference, Law Department, continued employment, prospective economic advantage, failure to investigate, defamation claim, at-will, new trial, qualified privilege, breach of contract, defamation, veracity, interfering, defamatory statement, reckless

disregard, investigating, erroneously, articulated, emphasizing, terminated, misleading, undertaken, prejudiced, tortiously, formerly, accuracy, awarding, reckless, enjoyed

COUNSEL: For BEVERLY B. MANN, Plaintiff - Appellant: Gregory A. Stayart, Chicago, IL.

For CITY OF CHICAGO, HAROLD J. WASHINGTON, JAMES D. MONTGOMERY, Defendants - Appellees: Lawrence Rosenthal, Nancy Van Allen, Benna R. Solomon, Susan S. Sher, Mardell Nereim, OFFICE OF THE CORPORATION COUNSEL, Chicago, IL.

JUDGES: Before Honorable WILLIAM J. BAUER, Circuit Judge, Honorable KENNETH F. RIPPLE, Circuit Judge, Honorable ILANA DIAMOND ROVNER, Circuit Judge

OPINION: ORDER

Beverly B. Mann filed suit against the City of Chicago, James Montgomery (formerly Chicago's Corporation Counsel), and Jayne Barnard and Timothy O'Hara (formerly of the Corporation Counsel's office) after she was terminated from her position as an Assistant Corporation Counsel in 1983. Her Third Amended Complaint asserted claims based on the First and Fourteenth [*2] Amendments to the Constitution of the United States, the consent decree entered in *Shakman v. Democratic Organization of Cook County,* and Illinois law; a supplemental complaint also alleged a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. A number of Mann's claims were dismissed or disposed of on summary judgment. The case proceeded to trial in 1991 on the *Shakman* claim and Mann's state law claims for defamation, breach of contract, and tortious interference with a prospective economic advantage. The jury found in favor of Mann on the breach of contract claim

(awarding damages of $ 68,285) and on her claim for tortious interference with the prospective economic advantage of continued employment with the City's Law Department (awarding damages of $ 74,700); but it found against her on her claims of defamation and tortious interference with the prospective economic advantage of alternative employment following her departure from the Law Department. The trial judge entered findings against Mann on the *Shakman* claim. Mann has appealed from the adverse disposition of a number of her claims; the City and Montgomery, in turn, have cross-appealed from [*3] the verdicts entered against them on the breach of contract and tortious interference claims. After considering all of the arguments raised by the parties, we have concluded that only two claims merit our discussion here: the defamation claim and the claim for tortious interference with the prospective economic advantage of Mann's continued employment with the Law Department. Based on our finding that the jury was erroneously instructed as to each of these claims, we vacate the verdicts rendered (against Mann on the defamation claim, for her on the tortious interference claim) and remand for a new trial on those claims alone; the judgment below is affirmed in all other respects.

I. THE DEFAMATION INSTRUCTION

In Count VIII of her Third Amended Complaint, Mann alleged that Barnard and O'Hara had defamed Mann by making false statements about her job performance and competence as an attorney to her superiors within the Law Department; Mann also alleged that Barnard made additional defamatory statements to prospective employers outside the Law Department. The parties agree that because Barnard and O'Hara made any such statements in fulfillment of their duties as employees of the City, [*4] they enjoyed a qualified privilege and can only be held liable if Mann proved that the

defendants made a defamatory statement or statements with actual malice. *See Krasinski v. United Parcel Serv., Inc.*, 124 Ill. 2d 483, 530 N.E.2d 468, 471, 125 Ill. Dec. 310 (Ill. 1988); *Anderson v. Vanden Dorpel*, 268 Ill. App. 3d 907, 645 N.E.2d 250, 258-59, 206 Ill. Dec. 245 (Ill. App. 1994), *appeal allowed*, 652 N.E.2d 338 (1995); *Davis v. John Crane, Inc.*, 261 Ill. App. 3d 419, 633 N.E.2d 929, 937-38, 199 Ill. Dec. 133 (Ill. App. 1994); *Muthuswamy v. Burke*, 269 Ill. App. 3d 728, 646 N.E.2d 616, 620, 207 Ill. Dec. 50 (Ill. App. 1993). At issue here is an instruction concerning the malice element of the defamation claim. With the parties' agreement, the district court advised the jury that a statement is made with actual malice if "the defendant made the statement despite knowing that it was false or despite a high degree of awareness of its probable falsity or entertaining serious doubts as to its truth." R. 406. However, over Mann's objection, the court went on to instruct the jury that "[a] defendant's mere failure to conduct a proper investigation into the truth of a statement before making it to another does not constitute the actual malice required for plaintiff to prevail on her defamation claim." *Id.* (Defendant's Proposed [*5] Instruction 4-B.) Mann argues that the additional instruction conflicted with the court's explanation of actual malice and erroneously suggested to the jury that a defendant might not act with actual malice if he makes a statement without first investigating its veracity, even if he entertains serious doubts on that subject. We agree.

It is, in one sense, correct to say that the failure to investigate the truth of a statement does not, in and of itself, establish a defendant's actual malice in making the statement. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S. Ct. 1323, 1325, 20 L. Ed. 2d 262 (1968); *Troman v. Wood*, 62 Ill. 2d 184, 340 N.E.2d 292, 295 (Ill. 1975); *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389, 393 (N.D. Ill. 1985); *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 334 N.E.2d 79, 88 (Ill. App. 1975);

Bloomfield v. Retail Credit Co., 14 Ill. App. 3d 158, 302 N.E.2d 88, 96 (Ill. App. 1973); *see also Beauvoir v. Rush-Presbyterian-St. Luke's Medical Center*, 137 Ill. App. 3d 294, 484 N.E.2d 841, 844, 92 Ill. Dec. 110 (Ill. App. 1985). But this is merely another way of emphasizing that when a defamatory statement is qualifiedly privileged, ordinary negligence will not suffice to establish liability; at a minimum, the plaintiff will have to show that the defendant acted [*6] with reckless disregard of its truth. *Durso v. Lyle Stuart, Inc.*, 33 Ill. App. 3d 300, 337 N.E.2d 443, 446 (Ill. App. 1975); *Bloomfield*, 302 N.E.2d at 95.

> Reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

St. Amant, 390 U.S. at 731, 88 S. Ct. at 1325. Thus, when the cases reiterate that the failure to investigate is not alone enough to establish actual malice, they mean simply that additional proof concerning the defendant's mental state is required. A defendant who repeats information without first checking into its accuracy is not reckless so long as he harbors no serious doubts on that score; on the other hand, a defendant who has serious reservations as to the veracity of the information may well be reckless if he repeats the information without investigating. *Fopay*, 334 N.E.2d at 88-90. The failure to investigate thus remains [*7] "a very important consideration" in

assessing the defendant's culpability. *Fopay*, 334 N.E.2d at 90.

The instruction which the district court gave here is misleading in the sense that it suggests that the element of actual malice requires the defendant to have done, or omitted to do, more than simply failing to look into the truth of the statement he made. In fact, so long as the defendant doubted the veracity of the statement, his failure to investigate may well be enough to establish liability. One who suspects that a statement is inaccurate but decides to make it anyway without attempting to establish its truth evinces an indifference that amounts to actual malice. The instruction was misleading in another, more fundamental sense as well. It focused the jury's attention upon a single circumstance which, albeit highly relevant, ultimately is collateral to the central question in a defamation case -- the defendant's regard for the accuracy of the complained of statement. For just this reason, the Illinois Supreme Court in *Reed v. Northwestern Pub. Co.*, 124 Ill. 2d 495, 530 N.E.2d 474, 487, 125 Ill. Dec. 316 (Ill. 1988), *cert. denied*, 489 U.S. 1067, 109 S. Ct. 1344, 103 L. Ed. 2d 813 (1989), upheld the trial court's refusal [*8] to give an instruction which advised the jury that it could infer actual malice from a "grossly inadequate" investigation, emphasizing the court's history of disapproving jury instructions which give "undue prominence" to particular facts. The instruction should likewise have been refused here.

The balance of the instructions given upon defamation did nothing to correct the misguided focus that the "mere failure to investigate" instruction gave the jury. We must therefore conclude that the jury deliberated with an incorrect impression of the law and that Mann was prejudiced by the mistaken instruction. *See generally DePaepe v. General Motors Corp.*, 33 F.3d 737, 743-44 (7th Cir. 1994). Mann is therefore entitled to a new trial on her defamation claim.

II. TORTIOUS INTERFERENCE WITH THE PROSPECTIVE ECONOMIC ADVANTAGE OF CONTINUED EMPLOYMENT WITH LAW DEPARTMENT

In Count XI of her Third Amended Complaint, Mann alleged that Montgomery, O'Hara, and Barnard had all wrongfully interfered with her expectation of continued employment with the city's Law Department. The jury found in favor of O'Hara and Barnard on this claim, but against Montgomery. Montgomery contends that the verdict [*9] may have been the product of an erroneous jury instruction that advised the jury that the defendants acted with the requisite "actual malice" in interfering with Mann's prospective economic advantage if the jury found that they acted "with the intent and purpose to injure the plaintiff" or they acted "without justification." R. 406. Montgomery argues that "without justification" has a very specific meaning in the context of an at-will employment relationship like the one Mann had with the city; and because the district court failed to apprise the jury of what "without justification" meant, Montgomery reasons, the jury may have been misled as to what proof would be adequate to meet this element of the tortious interference claim. Again, we agree.

As an at-will employee of the city, Mann could be terminated for any reason or for no reason at all. *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 645 N.E.2d 877, 879, 206 Ill. Dec. 625 (Ill. 1994) (plurality); *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 601 N.E.2d 720, 728, 176 Ill. Dec. 22 (Ill. 1992); *Fellhauer v. City of Geneva*, 142 Ill. 2d 495, 568 N.E.2d 870, 875, 154 Ill. Dec. 649 (Ill. 1991). Although an at-will employee thus has no enforceable *contractual* right to continued employment, the Illinois courts [*10] have recognized a cause of action for tortious interference with an at-will employee's legitimate *expectation* of continued

employment. *E.g., Fellhauer,* 568 N.E.2d at 878-79. Montgomery, O'Hara, and Barnard, of course, were not outsiders intermeddling with the relations between Mann and her employer; they were supervisory employees with a duty to oversee and evaluate the work of Mann and other attorneys. *See id.* As such, they enjoyed a qualified privilege to exercise their professional judgment and act in good faith on the city's behalf. *See id.; Mittelman v. Witous,* 135 Ill. 2d 220, 552 N.E.2d 973, 987, 142 Ill. Dec. 232 (Ill. 1989). Thus, only if the defendants acted in a fashion Illinois courts describe as "without justification or maliciously" may they be held liable for tortiously interfering with Mann's expectation of continued employment with the city. *Id.* at 987; *Fellhauer,* 568 N.E.2d at 878; *Swager v. Couri,* 77 Ill. 2d 173, 395 N.E.2d 921, 927, 32 Ill. Dec. 540 (Ill. 1979); *H.F. Philipsborn & Co. v. Suson,* 59 Ill. 2d 465, 322 N.E.2d 45, 50 (Ill. 1974).

Although Illinois courts have never expressly articulated a definition of "without justification" in this context, it is quite clear that they have never employed those words [*11] in their ordinary sense -- i.e., as the equivalent of "unjustly" or "for no valid reason." Instead, consistent with the nature of a defendant's qualified privilege -- that is, to act in good faith for the benefit of his employer -- the courts have described tortious conduct to fall principally into two categories: (1) behavior intended solely to harm the plaintiff; and (2) behavior that is undertaken solely for the defendant's interest, and not that of his employer. The first of these categories is, quite obviously, what the courts are referring to when they speak of "malicious" behavior or "actual malice". *See, e.g., MGD, Inc. v. Dalen Trading Co.,* 230 Ill. App. 3d 916, 596 N.E.2d 15, 18, 172 Ill. Dec. 736 (Ill. App. 1992) ("'actual malice' is a positive desire or intent to injure another"). The second category is what has been described as conduct undertaken "without justification," and it thus becomes

apparent that something unique is meant by those words. In case after case, courts have described this realm of conduct not to include behavior that is irrational, unexplained, or unjust, but actions taken solely for the defendant's own gain and contrary to the best interests of the employer. *See, e.g., Fellhauer,* [*12] 568 N.E.2d at 878-79; *Mittelman,* 552 N.E.2d at 987; *Girsberger v. Kresz,* 261 Ill. App. 3d 398, 633 N.E.2d 781, 790, 198 Ill. Dec. 940 (Ill. App. 1993); *see also George A. Fuller Co. v. Chicago College of Osteopathic Medicine,* 719 F.2d 1326, 1333 (7th Cir. 1983); *Cromley v. Board of Educ. of Lockport Township High School Dist. 205,* 699 F. Supp. 1283, 1299 (N.D. Ill. 1988); *Vassardakis v. Parish,* 36 F. Supp. 1002, 1005 (S.D.N.Y. 1941). It would be illogical to define the range of culpable conduct otherwise -- at will employment, after all, implies that it is the employer's prerogative to discharge an employee whether a jury might think it fair or not.

Despite the distinct meaning "without justification" has in this context, the district court failed to define the term for the jury. With no other meaning to ascribe to the phrase, the jury could only have interpreted the phrase to mean "unfairly." It thus might have found Montgomery liable for tortiously interfering with Mann's expectation of continued employment with the Law Department if it believed Montgomery acted out of malice or without a reason the jury believed was just. That is plainly a far broader standard than articulated for the tort, and patently [*13] inconsistent with Mann's status as an at-will employee. Thus, we are compelled to conclude that the jury was not properly instructed as to the legal standards governing this claim and that Montgomery was prejudiced by the mistake. Montgomery is therefore entitled to a new trial.

III. CONCLUSION

For the reasons we have given, we vacate the verdicts rendered in favor of Barnard and O'Hara and against Mann on Count VIII of the Third Amended Complaint and in favor of Mann and against Montgomery on Count XI of the Third Amended Complaint, and we remand for a new trial on those claims alone. The judgment below is affirmed in all other respects. The parties shall bear their own costs on appeal.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

BEVERLY B. MANN, Plaintiff, v. JAMES MONTGOMERY, JAYNE BARNARD, and TIMOTHY O'HARA, Defendants.

No. 84 C 11020

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1998 U.S. Dist. LEXIS 3195

March 13, 1998, Decided
March 16, 1998, Docketed

DISPOSITION: [*1] Defendants' Motion for Summary Judgment granted. Plaintiff's Motion to Strike Defendants' Motion for Entry of Judgment as a Matter of Law denied. Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment denied. Plaintiff's Motion for Reconsideration of this Court's Order Entered on February 17, 1998 granted. Plaintiff's Motion for Appointment of Counsel denied. Attorney Greg Stayart's Motion to Withdraw granted. All other pending motions moot.

CORE TERMS: summary judgment, tortious interference, appointment of counsel, reconsideration, prospective economic advantage, matter of law, discretionary, indigent, withdraw, state law, defamation, willful, immune, wanton, attorney of record, public employee, requisite

JUDGES: Wayne R. Andersen, United States District Judge.

OPINION BY: Wayne R. Andersen

OPINION: MEMORANDUM ORDER AND OPINION

After the Court of Appeals remanded this action for retrial on

two counts of Plaintiff's Third Amended Complaint, the parties brought a variety of motions which are decided below. The facts of this case have been previously discussed in numerous opinions issued by courts at the trial and appellate level. For this reason, we will recite only the facts relevant to the instant motions.

BACKGROUND

Plaintiff, Beverly Mann, is a former Assistant Corporation Counsel in the City of Chicago's Law Department. Plaintiff's employment ended on September 30, 1984. On October 31, 1985, Plaintiff filed her Third Amended Complaint against the City of Chicago, James Montgomery, then the Corporation Counsel, Jayne Barnard, then a Deputy Corporation Counsel and Administrator of Personnel, and Timothy O'Hara, then Chief Assistant Corporation Counsel of the Torts Division. Plaintiff claimed that Defendants had a policy of discharging employees for political reasons. [*3] She further asserted that political considerations motivated Defendants to base her performance reviews on allegedly inaccurate and misleading evaluations and to terminate her employment. Plaintiff specifically brought claims for: violation of the Shakman decree prohibiting political and patronage dismissals (Count I), infringement of her First Amendment rights to free association and expression under 42 U.S.C. § 1983 (Count II), deprivation of liberty without due process of law under 42 U.S.C. § 1983 (Counts III, IV, V, and VI), denial of equal protection under 42 U.S.C. § 1983 (Count VII), defamation (Count VIII), breach of contract (Counts IX and X), tortious interference with contract and tortious interference with prospective economic advantage (Count XI), and violation of the Illinois Personnel Records Act (Count XII).

In 1986, Judge Moran dismissed Counts IV, V, VI, and IX

with prejudice and dismissed Count XI against the City of Chicago. In August 1991, Judge Lindberg granted Defendants' motion for summary judgment on Counts II, III, VII, and XII. On Count X, Judge Lindberg granted summary judgment in favor of O'Hara and Barnard but denied the motion for Montgomery [*4] and the City of Chicago. On Count XI, Judge Lindberg granted summary judgment for Defendants on Plaintiff's tortious interference with contract claim, but not on the tortious interference with prospective economic advantage cause of action.

The remaining counts were tried in October 1991. Count I was tried to the judge and Counts VIII, X, and XI were tried to a jury. Judge Lindberg held that Plaintiff failed to present evidence to support her claim that politics motivated her discharge (Count I). The jury found in Defendants' favor on Count VIII and in Plaintiff's favor on Counts X and XI and awarded her $ 68,285 on Count X. Both parties appealed.

In an unpublished order issued on January 19, 1996, the Seventh Circuit held that the trial judge erroneously instructed the jury as to the defamation claim (Count VIII) and the tortious interference with prospective economic advantage claim (Count XI). Accordingly, the court vacated the verdicts on those counts, remanded those claims for a new trial, and affirmed the judgment in all other respects.

The remaining defendants, Montgomery, Barnard and O'Hara, now move for summary judgment on Counts VIII and XI citing a recent change in Illinois [*5] law. Alternatively, they argue that their conduct was privileged and that Plaintiff cannot demonstrate the requisite malice needed to overcome the privilege.

Defendants also move to strike Plaintiff's response to their motion for summary judgment. Plaintiff moves to strike

Defendants' motion for summary judgment, for reconsideration of this Court's order entered on February 17, 1998, and for appointment of counsel. Plaintiff's attorney of record moves to withdraw.

DISCUSSION

I. Defendants' Motion for Summary Judgment

The doctrine of the law of the case precludes reconsideration of a matter already decided unless an exceptional circumstance exists, such as a change in controlling authority during the pendency of the lawsuit. Law v. Medco Research, Inc., 113 F.3d 781, 783 (7th Cir. 1997); Nemmers v. United States, 870 F.2d 426, 429 (7th Cir. 1989); Barrington Press, Inc. v. Morey, 816 F.2d 341, 342 n. 2 (7th Cir. 1987), cert. denied, 484 U.S. 906, 98 L. Ed. 2d 207, 108 S. Ct. 249 (1987). Furthermore, while the matter is *sub judice*, a federal court must apply state law "in accordance with the then controlling decision of the highest state court." Vandenbark [*6] v. Owens-Illinois Glass Co., 311 U.S. 538, 543, 85 L. Ed. 327, 61 S. Ct. 347 (1941). Plaintiff's defamation and tortious interference with prospective business advantage claims are still under judicial consideration. Thus, we are obligated to give effect to any change in state law made during the course of the proceeding.

Defendants argue that, based on a recent Illinois Supreme Court ruling, the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq., bars Plaintiff's remaining claims. Section 10/2-201 states:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is

> not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

The language of the statute has not been changed. At the time the pre-trial motions and appeal were decided, however, the Illinois courts were split on the question of whether § 10/2-201 applied to willful and wanton conduct. After the appeals court remanded the instant matter, the Illinois Supreme Court held that "the legislature [*7] . . . intended to immunize liability for both negligence and willful and wanton conduct." In re Chicago Flood Litigation, 176 Ill. 2d 179, 680 N.E.2d 265, 273, 223 Ill. Dec. 532 (1997). This case is controlling.

Under § 10/2-201, a public employee is not liable for discretionary acts. Id. "Discretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." Snyder v. Curran Township, 167 Ill. 2d 466, 657 N.E.2d 988, 992, 212 Ill. Dec. 643 (1995). If Defendants' acts are discretionary, they are absolutely immune from liability.

Here, Plaintiff claims that O'Hara and Barnard prepared defamatory performance evaluations and that Montgomery's decision to discharge her amounted to tortious interference with prospective economic advantage, i.e., Plaintiff's continued employment with the City of Chicago. Defendants' acts, which included hiring, firing, and evaluation of subordinates, are discretionary acts. See Anderson v. Grayslake [*8] School Dist. No. 46, 1997 U.S. Dist. LEXIS 15980, No. 94 C 5133, 1997 WL 639032, *1 (October 3, 1997) (applying Illinois law); Johnson v. Mers, 279 Ill. App. 3d 372, 664 N.E.2d 668, 675, 216 Ill. Dec. 31 (1996). Thus,

as a matter of law under In re Chicago Flood Litigation and 745 ILCS 10/2-201, Defendants are immune from liability. Summary judgment must now be granted for Defendants on Counts VIII and XI of Plaintiff's Third Amended Complaint.

II. Plaintiff's Motion to Strike Defendants' Motion for Entry of Judgment as a Matter of Law

Plaintiff also moves the Court to strike Defendants' motion for summary judgment. Plaintiff claims that Defendants are barred from reasserting on remand "claims or defenses already litigated on appeal, absent new factual information or an alteration in the pertinent substantive law." (Pl. Motion to Strike, pp. 1-2).

Plaintiff is correct that the evidence cited by Defendants on remand is not substantially different from the facts already decided in this case. Nemmers, 870 F.2d at 428. Nevertheless, we have already granted Defendants' motion for summary judgment based on the recent change in the relevant Illinois law. Accordingly, Plaintiff's Motion to Strike [*9] Defendants' Motion for Entry of Judgment as a Matter of Law is denied.

III. Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment and Plaintiff's Motion for Reconsideration of this Court's Order Entered on February 17, 1998

Because we have granted the motion for summary judgment due to the change in Illinois law, Plaintiff need not submit a 12(n) statement. Thus, Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment is denied and Plaintiff's Motion for Reconsideration is granted.

IV. Plaintiff's Motion for Appointment of Counsel

In considering a motion to appoint counsel, we begin with the fundamental premise that there is no constitutional or statutory right to counsel in federal civil cases. Jackson v. County of McLean, 953 F.2d 1070, 1071 (7th Cir. 1992). Nonetheless, the district court may in its discretion request counsel to represent indigent litigants. 28 U.S.C. § 1915(e)(1). As a threshold matter, the court must determine whether the litigant is indigent and whether she has made reasonable attempts to retain counsel. Jackson, 953 F.2d at 1072-1073; Boubonis v. Chater, [*10] 957 F. Supp. 1071, 1073 (E.D. Wisc. 1997).

Plaintiff has made the requisite reasonable attempt to obtain counsel and has been represented by counsel at points in this litigation. Although Plaintiff states that she has spent approximately $ 175,000 on attorneys' fees and costs to date, she now claims her financial resources are exhausted. Plaintiff, however, presents no evidence establishing that she meets the financial criteria necessary to qualify as an indigent litigant. Moreover, Plaintiff is an attorney and capable of presenting her case. Indeed, Plaintiff has represented herself on appeal. Furthermore, we do not believe that the factual and legal issues at this stage of the litigation are unusually complex. Therefore, appointment of counsel will not serve the interests of justice. Farmer v. Haas, 990 F.2d 319, 322 (7th Cir. 1993), cert. denied, 510 U.S. 963, 126 L. Ed. 2d 372, 114 S. Ct. 438 (1993); see also Zarnes v. Rhodes, 64 F.3d 285, 288 (7th Cir. 1995).

Plaintiff's motion for appointment of counsel is hereby denied.

V. Motion for Withdrawal of Plaintiff's Counsel

Plaintiff's attorney of record, Gregory Stayart, moves to withdraw as counsel for Plaintiff. [*11] This motion is hereby granted.

CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is granted. Plaintiff's Motion to Strike Defendants' Motion for Entry of Judgment as a Matter of Law is denied. Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment is denied. Plaintiff's Motion for Reconsideration of this Court's Order Entered on February 17, 1998 is granted. Plaintiff's Motion for Appointment of Counsel is denied. Attorney Greg Stayart's Motion to Withdraw is granted.

All other pending motions are moot. This is a final appealable order.

It is so ordered.

Wayne R. Andersen

United States District Judge

Dated: 3-13-98

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN,	)	
	)	
Plaintiff,	)	
	)	No. 84 C 11020
	)	
	)	Honorable Wayne R. Andersen
JAMES MONTGOMERY,	)	
JAYNE BARNARD, and	)	
TIMOTHY O'HARA,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff, Beverly Mann, moves this Court to reconsider its order entered March 13, 1998 granting the motion for summary judgment of Defendants James Montgomery, Jayne Barnard, and Timothy O'Hara. In addition, Plaintiff requests that this Court reconsider the August 13, 1991 order granting partial summary judgment for Defendants, which then included the City of Chicago. For the following reasons, Plaintiff's motion is denied.

I. STANDARD OF REVIEW

Motions for reconsideration serve a limited purpose. A motion for reconsideration is properly brought if "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or

facts since the submission of the issue to the Court." Bank of Waunakee v. Rocheste Cheese Sales- Inc., 906 F.2d 1185, 1191 (7th Cir. 1990). On reconsideration, a party may not introduce new evidence or new legal theories that could have been presented earlier. Caisse Nationale de Credit Agricole v. CBI Indus- Inc., 90 F.3d 1264, 1269 (7th Cir.1996).

II. DISCUSSION

The facts pertinent to the instant matter are set out Mann v. Montgomery, No. 84 C 11020, 1998 WL 122779 (N.D. 111. March 13, 1998).

A. Reconsideration of the March 13, 1998 Order

In our March 13, 1998 order, we granted Defendants' motion for summary judgment on Plaintiff's claims for defamation (Count VIII) and tortious interference with prospective economic advantage (Count 3a) based on the Local Governmental and Governmental Employees Tort Immunity Act, 745 ILCS 10/1-101 et seq. Section 10/2-201 states:

> Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused.

After the Seventh Circuit remanded the instant lawsuit for retrial on Counts VIII and XI due to erroneous jury instructions, the Illinois Supreme Court held that in enacting 745 ILCS 10/2-201 "the legislature ... intended to immunize

liability for both negligence and willful and wanton conduct." In re Chicago Flood Litig., 176 111.2d 179, 680 N.E.2d 265, 273 (1997). Because this change in controlling law occurred while Counts VIII and XI remained under judicial consideration, we granted summary judgment.

On reconsideration, Plaintiff claims that Harinek v. 161 North Clark Street Ltd. Partnership, No. 82155, 1998 WL 66756 (111. Feb. 20, 1998) precludes summary judgment. At the time we issued our March 13, 1998 order, the HarinCk decision was not final. On April 9, 1998, the Illinois Supreme Court issued the mandate in the Harinek case. Accordingly, we will address Plaintiff's arguments concerning the Harinek decision.

In Harinek 1998 WL 66756, at *3, the Illinois Supreme Court held that an employee may be granted immunity under § 10/2-201 if- (1) he holds either a position involving the determination of policy or a position involving the exercise of discretion and (2) the act or omission is both a determination of policy and an exercise of discretion. For purposes of tort immunity, policy decisions are broadly defined as "'those decisions which require the municipality to balance competing interests and to make a judgment call as to what solution will best serve each of those interests. '" Id.

Discretionary acts as those acts "which are unique to a particular public office, while ministerial acts are those which a person performs on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." Snyder v. Curran Township, 167 III.2d 466, 657 N.E.2d 988, 992 (1995). Contrary to Plaintiff s assertion, the Illinois General Assembly did not limit the immunity granted under § 10/2-201 to discretionary decisions made while providing a governmental or proprietary service

or function. (Pl. Motion for Rec., pp. 8- 10). Accordingly, personnel decision making is inherently discretionary. " Johnson v. Mers 279 Ill. App. 3d 372, 664 N.E.2d 668, 675 (1996) (holding that "the decision to hire or not to hire a police officer is an inherently discretionary act and, thus, is subject to the immunities contained in [10/2-201]"). See also Anderson v. Grayslake School Dist. No. 46, No. 94 C 5133, 1997 WL 639032, * 1 (N.D. Ill. October 3, 1997) (holding that the decision to fire school custodians is a discretionary act subject to immunity).

Defendants were under no legal mandate to make personnel decisions in a prescribed manner. Rather, they exercised discretion in determining why, When, where, and how personnel decisions were made and implemented. Accordingly, we find that Defendants' acts, which included hiring, firing, and discussing and evaluating subordinates such as Plaintiff, are discretionary acts under § 10/2-201. Prong one of the Harinek test is, therefore, satisfied.

Under the broad definition of policy recited in Harinek we find that Defendants' acts are policy determinations for immunity purposes. Defendants' evaluation of and comments on Plaintiff's performance and their decision to fire Plaintiff necessarily involved a balancing of competing interests. Defendants were required to weigh Plaintiff's interest in remaining employed, Plaintiff's strengths and weaknesses, and the Department of Law's interest in retaining Plaintiff in light of her performance. Clearly, decisions of this type required Defendants to make "a judgment call" as to the solution that best served these competing interests. Thus, Defendants acts involved a determination of policy. Because, we have already held that Defendants' acts are discretionary, prong two of the Harinek test is satisfied.

Next, Plaintiff argues that Defendants are estopped from arguing that their actions constituted policy determinations for purposes of tort immunity because Defendants previously successfully contended that the City of Chicago cannot be held liable under 42 U.S.C. § 1983. We disagree.

. . The determination of "policy" for purposes of municipal liability under § 1983 is unrelated to the determination of "policy" under the Local Governmental and Governmental Employees Tort Immunity Act. For example, under § 1983 the court looks to state law, not to define the scope of "policy," but instead to define the official's functions for purposes of determining whether the official has "final policyrnaking authority." Duda v. Board of Educ. of Franklin Park School Dist No 84 133 F.3d 1054, 1061 (7th Cir. 1998). The Local Governmental and Governmental Employees Tort Immunity Act, however, contains no requirement that the governmental employee possess authority conferred by statute or municipal ordinance to determine "policy." Illinois law mandates only that the decision maker balance competing interests and determine a solution based on his judgment. Harinek, 1998 WL 66756, at *3. The federal and state standards are unrelated. Thus, Defendants' are not estopped from asserting that their conduct involved a determination of policy.

In addition, Plaintiff contends that § 10/2-201 does not provide immunity for intentional torts involving malice, which "entail[] deliberateness or recklessness." (Pl. Motion for Rec., p. 14). We disagree. The Illinois Supreme Court recently held that, "the legislature ... intended to immunize liability for both negligence and willful and wanton conduct." In re Chicago Flood Litig., 176 Ill.2d 179, 690 N.E.2d at 273. Accord, Harinek, 1998 WL 66756, at *6 (holding, "[e]ven willful and wanton conduct, however, cannot deprive a muni-

cipality of immunity granted by section 2-201 ... *); Reddick v. Bloomingdale Police Officers, No. 96 C 1109, 1997 WL 441328, *7 (N.D. E. July 30, 1997) (holding that § 10/2-201 "provides absolute immunity even against allegations of willful and wanton conduct"). Plaintiff s suggestion that § 10/2-201 provides immunity for willful and wanton conduct but not for deliberate or reckless conduct is contrary to Illinois law, Without direction from the Illinois legislature or judiciary, we will not carve out such an exception to § 10/2-201.

Finally, on reconsideration Plaintiff argues for the first time that § 10/2-201 is unconstitutional. A motion for reconsideration is not the proper avenue in which to raise a new legal theory. Caisse Nationale de Credit Agricole, 90 F. 3 d at 1269. Accordingly, we will not address this argument.

For all the foregoing reasons, we find that summary judgment is properly granted for Defendants on Counts VIII and XI of Plaintiffs third amended complaint. Thus, Plaintiffs motion to reconsider this Court's March 13, 1998 order is denied.

B. Reconsideration of the August 13, 1991 Order

Citing the 1998 United States Supreme Court decision in Oncale v. Sundowner Offshore *Sery.- Inc.*, 118 S. Ct. 998 (1998), Plaintiff argues that this Court must reconsider Judge Lindberg's August 13, 1991 ruling. We disagree.

On August 13, 199 1, Judge Lindberg, granted Defendants' motion for summary judgment on Plaintiff's claims for infringement of her First Amendment rights to free association and expression under 42 U. S.C. § 1983 (Count II), deprivation of liberty without due process of law under

42 U.S. C. § 1983 (Count III), denial of equal protection under 42 U. S.C. § 1983 (Count VII), and violation of the Illinois Personnel Records Act (Count XII). As to Count X, breach of contract, Judge Lindberg granted summary judgment in favor of O'Hara and Barnard but denied the motion for Montgomery and the City of Chicago. On Count XL Judge Lindberg granted summary judgment for Defendants on Plaintiff's tortious interference with contract claim, but not on the tortious interference with prospective economic advantage cause of action.

The doctrine of the law of the case precludes reconsideration of a matter already decided unless an exceptional circumstance exists, such as a change in controlling authority while the matter *is sub judice.* Law v. Medco Research. Inc., 113 F.3d 781, 783 (7th Cir. 1997); Nemmers v. U.S., 870 F.2d 426, 429 (7th Cir. 1989); Barrington Press, Inc. Morey, 816 F.2d 341, 342 n. 2 (7th Cir.), cert. denied 484 U.S. 906 (1987). The issues decided in the August 13, 1991 order have already been determined on appeal and are no longer under judicial consideration. Accordingly, the August 13, 1991 order can no longer be argued on reconsideration.

Additionally, Plaintiff asserts that, "this Court's apparent finding in its memorandum opinion and order entered on March 13, 1998, that the Defendants' conduct occurred in determining governmental policy requires reconsideration of the summary judgment entered in favor of the Defendants in Mann's claim brought pursuant to the First Amendment, as that summary judgment was based on the defendants' repeated insistence that their conduct and motive neither determined nor reflected government policy." (Pl. Motion for Rec., p. 22). For the same reasons as stated in Section A and in the previous paragraph, we decline to reconsider Plaintiff's claim under the First Amendment.

III. CONCLUSION

For the foregoing reasons, Plaintiff's motion to reconsider this Court's March 13, 1998 and August 13, 1991 Orders is denied.

It is so ordered.

Wayne R. Andersen
United States District Judge

Dated: _____

This matter is before the Court on the motion of plaintiff pursuant to F.R.C.P. 60(b) to vacate order entered on July 14, 1986, dismissing counts K IV and V of the third amended complaint, and reconsideration of the orders entered on August 29, 1986, and on December 15, 1986, amending the July 14, 1986 order, and reconsideration of the order entered on August 13, 199 1, granting the defendants' motion for summary judgment regarding the remainder of Count III."

Under Federal Rule of Civil Procedure 60(b), plaintiff's motion "must be made within a reasonable time." Plaintiff's motion seeks to revisit decisions made seven and twelve years ago. More than a reasonable time has passed since the Court decided the issues in the asserted orders. Plaintiff's motion is, therefore, untimely.

Accordingly, plaintiff's "motion pursuant to F.R.C.P. 60(b) to vacate order entered on July 14, 1986, dismissing counts III, IV and V of the third amended complaint, and reconsideration of the orders entered on August 29, 1986, and on December 15, 1986, amending the July 14, 1986 order, and reconsideration of the order entered on August 13, 1991, granting the defendants' motion for summary judgment regarding the remainder of Count III" is denied.

It is so ordered.

_____

Wayne R. Andersen
United States District Judge

Dated: _____

Beverly B. Mann, Plaintiff, v. James Montgomery, et al., Defendant.
No. 84 C 11020
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
1994 U.S. Dist. LEXIS 9893
July 18, 1994, Decided
July 19, 1994, Docketed

CORE TERMS: summary judgment, partner, sex discrimination, tortious interference, Law Department, sexual, stereotyping, candidate, bitched, sex, job performance, terminating, partnership, stereotype, sex-based, woman, prospective economic advantage, decision to terminate, discriminatory intent, termination, direct evidence, femininely, attractive, recommend, evaluated, assigned, male, City Of Chicago Law Department, unconstitutionally vague, equal protection clause

JUDGES: [*1] LINDBERG

OPINION BY: GEORGE W. LINDBERG

OPINION: MEMORANDUM OPINION

The United States Court of Appeals for the Seventh Circuit has remanded this case for the limited purpose of permitting this court to enter a statement of reasons for its granting partial summary judgment in favor of defendants. U.S. Ct. App, 7th Cir, CR 50.

The order granting partial summary judgment was entered on August 13, 1991. At that time, there were pending plaintiff's Supplemental Complaint and Counts I, II, III, VII, VIII, X, XI, and XII of plaintiff's Third Amended Complaint.

Summary judgment was denied as to Counts I and VIII of the Third Amended Complaint.

Count II alleged a Section 1983 political discrimination claim. 42 USC § 1983. The Illinois Appellate Court has described the City of Chicago Law Department and its attorneys as follows:

> All of the attorneys work in multiple areas and . . . the demands of the client (i.e., the City of Chicago) are such that an attorney may be assigned to the Torts Division on one day and the Labor and Personnel Division the next. . . .
>
> ...
>
> Second, all of the Law Department attorneys have the authority to recommend changes in the manner in [*2] which the city operates. Indeed, the record reveals that the city depends on the recommendations from the Law Department to function on a day-to-day basis. The Law Department attorneys review all legislation voted upon by the City Council, assist alderman [sic] and city departments on rules and regulations, draft personnel ordinances for city employees, carry out the mayor's executive orders regarding hiring quotas, take measures to increase revenues for the city budget, recommend changes in the city's labor contracts with outside unions, alter the city's licensing policies and practices, and review and modify all of the personal service contracts executed by the city.

. . . .

> Third, the Law Department attorneys exercise a tremendous amount of discretion on behalf of the city. . . .
>
> . . . . Although there are senior members (i.e., supervisors), all of the attorneys exercise managerial discretion on behalf of the city. All of the attorneys are involved in hiring, have access to all files, and may be assigned to labor-related matters. The authority structure within the Law Department is diffused rather than rigid. And, all of the attorneys may, at any time, be assigned to work closely [*3] with the mayor or his advisors on special projects vitally important to the interests of the city.

Salaried Employees of North America (SENA) v Illinois Local Labor Relations Board, 202 Ill. App. 3d 1013, 560 N.E.2d 926, 933-34, 148 Ill. Dec. 329 (1990). Given the breadth of the duties of Law Department attorneys, their authority to recommend changes in the manner in which the city operates, their tremendous amount of discretion, and that they may be called upon to work closely with the mayor or his advisors at any time, their political affiliation is an appropriate consideration when they are terminated. Williams v City of River Rouge, 909 F.2d 151, 155 (6th Cir 1990) ("Given the function of a city attorney and the decisions of courts that have addressed the issue, it is difficult to imagine a set of facts under which it would violate the first amendment to fire a city attorney for purely political reasons."). See Hudson v Burke, 913 F.2d 427, 434 (7th Cir 1990) ("Appellants were political hires whose sponsor lost power. . . . Political affiliation was an [*4] appropriate

consideration when they were hired, and was equally appropriate when they were fired."). Therefore, defendants were granted summary judgment on Count II.

Count III alleged that plaintiff was deprived of liberty without due process of law by certain statements made about her. 42 USC § 1983. In a footnote to her response to defendants' motion for summary judgment, plaintiff stated:

> Plaintiff's claim for deprivation of liberty was significantly limited by Judge Moran's prior Order to the phrases "paranoid" and "emotionally disturbed". Although these phrases were used to describe plaintiff within the Corporation Counsel's Office, plaintiff is not pursuing a claim for publication of either description outside the office. Plaintiff, however, intends to seek reconsideration of Judge Moran's earlier decision limiting the claim. For this reason, this Response does not address Count III.

(Emphasis added). Plaintiff thus stated that she was not pursuing the only portions of Count III remaining after the disposition of the prior motion to dismiss by Judge Moran. For this reason, defendants were granted summary judgment on Count III. [*5]

The portion of Count VII remaining at the time of the ruling on the motion for summary judgment and the Supplemental Complaint alleged related claims. Count VII alleged a Section 1983 claim for violation of equal protection by discrimination against plaintiff because of her gender. 42 USC § 1983. The Supplemental Complaint alleged a claim for sex discrimination in violation of Title VII of the Civil Rights Act of 1964. 42 USC § 2000(e), et seq. The Supplemental Complaint's sex discrimination claim will be

addressed first.

Plaintiff contended that there was direct evidence of sex discrimination in terminating her from her job, in that there was evidence that defendant Montgomery considered sexual stereotypes in terminating her. Plaintiff noted that:

> Mr. O'Hara evaluated plaintiff's performance in the terms of her physical appearance. Mr. O'Hara made specific note of plaintiff's "attractive" appearance while male attorneys were spared that indignity.

However, in the context in which the "attractive" comment was made -- O'Hara calling her an "attractive, very intelligent attorney" -- it was a positive remark. [*6] There was no evidence that it was considered by defendant Montgomery to be in any way negative, much less to be a factor in favor of terminating plaintiff. Plaintiff further noted that:

> Beverly Mann was perceived has having "bitched" too much about her treatment although with good reason.

Use of the word "bitched" is not of itself proof of a sexual stereotype, "bitched" being common slang for "complained." Webster's Third New International Dictionary 222 (1986). There was no evidence that the word "bitched" was used as a sexual stereotype, and there was no evidence that male employees acting as plaintiff acted would not have been "perceived as having 'bitched' too much" about their treatment. Plaintiff also stated that:

> The record also clearly establishes that Mr. Montgomery considered comments that Beverly

> Mann was too pushy or aggressive and lacked humility in determining to terminate her. . . .

There was nothing wrong in defendant Montgomery's considering plaintiff's having poor interpersonal skills, see Price Waterhouse v Hopkins, 490 U.S. 228, 236, 109 S. Ct. 1775, 1783, 104 L. Ed. 2d 268 (1989), [*7] and there was no evidence that he would have considered the same traits as positive or even neutral in a male employee. There was, in short, no direct evidence of sex discrimination in the decision to terminate plaintiff.

Plaintiff contended that Price Waterhouse was a case very similar to hers. Price Waterhouse v Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989). However, in that case there was very strong evidence of sexual stereotyping in the employment decision. The plurality opinion states:

> There were clear signs, though, that some of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . . ; an other suggested that she "overcompensated for being a woman" . . . ; a third advised her to take "a course at charm school" . . . . Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only "because it's a lady using foul language." . . . . Another supporter explained that Hopkins "had matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, [*8] formidable, but much more appealing lady ptr candidate." . . . . But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board's decision to place her candidacy on hold who delivered the coup de grace: in order to improve her

chances for partnership, Thomas Beyer advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." . . . .

Dr. Susan Fiske, a social psychologist and Associate Professor of Psychology at Carnegie-Mellon University, testified at trial that the partnership selection process at Price Waterhouse was likely influenced by sex stereotyping. Her testimony focused not only on the overtly sex-based comments of partners but also on gender-neutral remarks, made by partners who knew Hopkins only slightly, that were intensely critical of her. One partner, for example, baldly stated that Hopkins was "universally disliked" by staff. . . , and another described her as "consistently annoying and irritating" . . . ; yet these were people who had very little contact with Hopkins. According to Fiske, Hopkins' uniqueness (as the [*9] only woman in the pool of candidates) and the subjectivity of the evaluations made it likely that sharply critical remarks such as these were the product of sex stereotyping -- although Fiske admitted that she could not say with certainty whether any particular comment was the result of stereotyping. Fiske based her opinion on a review of the submitted comments, explaining that it was commonly accepted practice for social psychologists to reach this kind of conclusion without having met any of the people involved in the decisionmaking process.

In previous years, other female candidates for partnership also had been evaluated in sex-based terms. As a general matter, Judge Gesell concluded, "candidates were viewed favorably if partners believed they maintained their femininity while

> becoming effective professional managers"; in this environment, "to be identified as a 'women's libber' was regarded as [a] negative comment." . . . . In fact, the judge found that in previous years "one partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers -- yet the firm took [*10] no action to discourage his comments and recorded his vote in the overall summary of the evaluations."

Price Waterhouse v Hopkins, 490 U.S. 228, 235-36, 109 S. Ct. 1775, 1782-83, 104 L. Ed. 2d 268 (1989). Plaintiff at bar had no evidence remotely similar to that in Price Waterhouse; she presented no evidence of overtly sex-based comments that affected the decision to terminate her, presented no expert testimony that gender-neutral remarks were the product of sex stereotyping, and presented no evidence that other female employees were evaluated in sex-based terms.

Plaintiff also contended that there was indirect proof of sex discrimination. Texas Department of Community Affairs v Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). See McDonnell Douglas Corporation v Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). However, defendants articulated a legitimate, nondiscriminatory reason for plaintiff's termination. Texas Department of Community Affairs v Burdine, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed. 2d 207 (1981). [*11] It was undisputed that defendant Montgomery was the decisionmaker with respect to plaintiff's termination. Based upon defendant O'Hara's 1983 and 1984 evaluations, defendant Montgomery concluded that plaintiff's poor job performance justified terminating her.

Plaintiff contended that defendant Montgomery was not justified in relying upon defendant O'Hara's evaluations, because Montgomery "was aware that these subjective evaluations were less than candid." However, defendant Montgomery's concern about the candidness of the evaluations was that they were overly positive about employees; that supervisors, including defendant O'Hara, were too reluctant to put negative information about employees in the evaluations. Moreover, plaintiff never told defendant Montgomery that she believed defendant O'Hara had a discriminatory animus toward her because of her sex. She did inform defendant Montgomery of remarks defendant O'Hara had made, but as discussed previously these remarks were not sexual stereotypes so that would not serve to put defendant Montgomery on notice that defendant O'Hara's negative evaluations were based on sexual animus toward plaintiff. There was, in other words, no reason [*12] for defendant Montgomery not to rely upon defendant O'Hara's evaluations in making the decision to terminate plaintiff.

Plaintiff also contended that Montgomery promoted her shortly before her termination, and claimed that this act was inconsistent with his believing that her job performance was poor. In fact, plaintiff was reassigned from a position in which she was trying tort cases to a position in which she was supervising law students preparing motions. This sort of reassignment does not rebut the evidence that defendant Montgomery believed plaintiff's job performance was poor.

Thus, there was no direct evidence of sex discrimination; defendants produced evidence that the decisionmaker, defendant Montgomery, terminated plaintiff for poor job performance; and plaintiff failed to produce evidence that this reason was a pretext for sex discrimination. This court accordingly granted defendants summary judgment on the

Supplemental Complaint.

The portion of Count VII remaining at the time of the ruling on the motion for summary judgment was a Section 1983 claim that plaintiff had been discriminated against because of her sex in violation of the equal protection clause. In order to [*13] establish this claim plaintiff would have to prove not just that she was treated differently from other similarly situated employees, but also purposeful and intentional acts of discrimination based on her membership in a particular class (i.e., that defendants acted with discriminatory intent). Sims v Mulcahy, 902 F.2d 524, 538-39 (7th Cir 1990). This requirement of proof of discriminatory intent makes the burden on a plaintiff alleging a Section 1983 equal protection sex discrimination claim much heavier than the burden on a plaintiff alleging a Title VII claim. Finally, similarly to the Title VII indirect proof analysis:

> If a prima facie case of racial discrimination under the Equal Protection Clause is established,
>
> > "the burden then shifts to defendants to articulate a legitimate non-discriminatory reason for taking the action alleged by plaintiff to be discriminatory. If defendants do articulate such a reason, the burden then shifts back to plaintiff to demonstrate that the proffered reason is merely a pretext for discrimination."

Sims v Mulcahy, 902 F.2d 524, 539 (7th Cir 1990), quoting Webb v City of Chester, 813 F.2d 824, 828 (7th Cir 1987). [*14]

Defendants were entitled to summary judgment on the Section 1983 equal protection sex discrimination claim in Count VII for the same reasons that they were entitled to summary judgment on the Title VII claim of the Supplemental Complaint. In addition, plaintiff did not present evidence that defendant Montgomery harbored a discriminatory intent when he decided to terminate her employment with the City of Chicago Law Department. For these reasons, defendants were granted summary judgment on Count VII of the Third Amended Complaint.

Count X alleged breach of a contract relating to what was to be told prospective employers or other persons contacting the City of Chicago Law Department about plaintiff. Summary judgment on this claim was granted in favor of defendants O'Hara and Barnard because they were not parties to the contract alleged. The other defendants, Montgomery and the City of Chicago, were parties to the contract alleged, so summary judgment was denied to them on Count X.

Count XI alleged both tortious interference with plaintiff's employment contract and tortious interference with her prospective economic advantage from her continued employment. Because plaintiff's employment [*15] was at-will, the court granted defendants summary judgment with respect to the tortious interference with a contract claim, plaintiff under those circumstances being unable to establish the element of that tort that her employer breached the employment contract. See Fellhauer v City of Geneva, 142 Ill.2d 495, 568 N.E.2d 870, 877-79, 154 Ill. Dec. 649 (1991); Delphi Industries, Inc. v Stroh Brewery Co., 945 F.2d 215, 220 (7th Cir 1991). See also Allstar Music, Inc. v Eckhoff, 257 Ill. App. 3d 961, 629 N.E.2d 816, 821, 196 Ill. Dec. 271 (Ill App 1994) (setting forth the elements of tortious interference with contractual relations). This rationale does not apply to tortious interference with prospective economic

advantage. Therefore, summary judgment was granted in defendants' favor on the tortious interference with a contract claim but not on the tortious interference with prospective economic advantage claim of Count XI.

Count XII alleged a claim for violation of the Illinois Personnel Records Act, Ill Ann Stat ch 48, § 2001, et seq. [*16] (West 1986) (the Act). The Illinois Supreme Court has held the Act unconstitutionally vague. Spinelli v Immanuel Lutheran Evangelical Congregation, Inc., 118 Ill.2d 389, 515 N.E.2d 1222, 113 Ill. Dec. 915 (1987). Plaintiff argued that summary judgment nonetheless should not be granted on Count XII because (1) the Act was subsequently amended and (2) Spinelli did not address Section 2006 which provided the basis for plaintiff's Count XII. As to plaintiff's first contention, the subsequent amendment of the Act cannot be applied to defendants' conduct prior to its effective date; this is particularly true in this case, where the Illinois Supreme Court held the statute unconstitutionally vague because it did not provide sufficient notice to employers of their obligations under the statute. As to the second contention, the Court in Spinelli stated:

> We therefore agree with the appellate court that the Act is vague and uncertain, and therefore, is unconstitutional in that it violates the due process rights of employers.

Spinelli v Immanuel Lutheran Evangelical Congregation, Inc., 118 Ill.2d 389, 515 N.E.2d 1222, 1228, 113 Ill. Dec. 915 (1987). [*17] Thus, the Illinois Supreme Court held the entire Act unconstitutional, and not only the sections of it specifically involved in the case before the Court. Accordingly, defendants were granted summary judgment on Count XII.

ENTER:
GEORGE W LINDBERG
District Judge
DATED: JUL 18 1994

1986 U.S. Dist. LEXIS 16517, *
BEVERLY B. MANN, Plaintiff, v. CITY OF CHICAGO, a Municipal Corporation, et al., Defendants
No. 84 C 11020
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
1986 U.S. Dist. LEXIS 16517
December 12, 1986, Decided; December 15, 1986, Filed
CORE TERMS: reconsideration, discriminatory conduct, participated, incompetence, restore, stigma, motion to dismiss

OPINION BY: [*1]

MORAN

OPINION: MEMORANDUM AND ORDER

Plaintiff moves for reconsideration of this court's August 29, 1986 reconsideration of its order of July 14, 1986 granting defendants' motion to dismiss in part and denying it in part. Plaintiff's motion is granted in part and denied in part.

Plaintiff first moves to restore the statements "sometimes silence speaks a mouthful" and that she "is not someone you would want to hire" to a place among the statements actionable in count III, a deprivation of liberty claim. She contends that Ratliff v. City of Milwaukee, 795 F.2d 612 (7th Cir. 1986) held that a mere label of incompetence accompanying a discharge can deprive a public employee of a liberty interest.

However, Ratliff did not so hold. In that case, the reports on the plaintiff accused her of virtual illiteracy, untruthfulness, and frequent insubordination, among other things. 795 F.2d at 615, 618-619, 626. Such charges go far beyond an

allegation of simple incompetence at a particular job, leaving "a stigma which makes [the former employee] virtually unemployable in his chosen profession." D'Acquisto v. Washington, 640 F.Supp. 594, 609 (N.D. Ill. 1986). The statements of which [*2] plaintiff complains do not. See, e.g., Perry v. F.B.I., 781 F.2d 1294, 1301-1302 (7th Cir. 1986). Plaintiff has apparently not yet found employment, and blames the negative statements. But failure to find employment as the result of an unfavorable reference from a governmental agency is not the same thing as laboring under a state-imposed stigma of unemployability. Id. at 1303. We stand by our earlier rulings on those statements.

Secondly, however, plaintiff moves to restore James Montgomery and the City of Chicago as defendants in count VII, the equal protection claim. In Bohen v. City of East Chicago, 799 F.2d 1180, 1189 (7th Cir. 1986), the Seventh Circuit held that a municipality could be liable for discriminatory conduct if "high-ranking, supervisory, and management officials . . . knew of, tolerated, and participated in" such conduct. Plaintiff has alleged, in paragraph 78 of count VII, that Montgomery became aware of the discriminatory motive behind negative performance evaluations others had given of plaintiff and nevertheless relied on those evaluations in terminating her. Under the liberal federal standard for surviving a motion to dismiss, see Kersey v. Jones [*3] & Laughlin Steel, Inc., 625 F.Supp. 1496, 1498 (N.D. Ill. 1986), those allegations are close enough to stating that Montgomery knew of and participated in discriminatory conduct to get an action against him past the pleading stage. If Montgomery is still a defendant, then so is the City, which could be liable since he is a municipal policymaker. Pembaur v. City of Cincinnati, 475 U.S. , , 106 S.Ct. 1292, 1300 (1986). This portion of the motion is granted.

CONCLUSION

Plaintiff's motion for reconsideration is granted as to the ruling dismissing James Montgomery and the City of Chicago as defendants from count VII. They are restored as parties to that count. The motion is otherwise denied.

JAMES B. MORAN, Judge, United States District Court.

December 12, 1986.

1986 U.S. Dist. LEXIS 20968, *

BEVERLY B. MANN, Plaintiff, v. THE CITY OF CHICAGO, a Municipal Corporation, TIMOTHY O'HARA; JAMES D. MONTGOMERY; and JAYNE W. BARNARD, Defendants

No. 84 C 11020

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1986 U.S. Dist. LEXIS 20968

August 29, 1986; September 5, 1986, Filed

CORE TERMS: discovery, drafted, First Amendment, reconsideration, policymaking, letter of recommendation, legal conclusion, deposition, extrinsic, spelling, premised, retract, nay, substantial part, deposed

OPINION BY: [*1]

MORAN

OPINION: MEMORANDUM AND ORDER

Given the span of plaintiff's complaint, the court felt it had given careful consideration to each of plaintiff's thirteen counts. The plaintiff, however, disagrees and has moved for reconsideration of portions of our memorandum and opinion. Mann v. City of Chicago, et al., No. 84 C 11020, slip op. (N.D. Ill. July 14, 1986). Plaintiff raises ten discrete points, each of which is addressed below according to the plaintiff's own numbering system.

1. Citing Lehpamer v. Troyer, 601 F.Supp. 1466 (N.D. Ill. 1985), aff'd 787 F.2d 595 (7th Cir. 1986), plaintiff claims we made findings of act based on extrinsic material. Judge Bua, in Lehpamer, stated the well-established rule that "a district

court must take all well pleaded facts in plaintiff's complaint as true." Id. at 1467. This is exactly what we did. It was plaintiff's decision to attach to her complaint sixteen exhibits, which comprised the majority of the "extrinsic material" upon which we relied. The only document we used in our "fact" section which was not supplied by plaintiff was her own deposition. We relied on it assuming plaintiff did not intend to contradict her statements [*2] later in the suit. We stand by that assumption.

Plaintiff is correct to point out that the complaint and its exhibits do not clearly establish who drafted the letter of recommendation of Mr. Montgomery signed. We though Ms. Mann had drafted it because of her letter to Mr. Montgomery dated October 25, 1984 stating that she would "provide a letter of recommendation." However, as we do not see what difference it makes, and since the complaint, at paragraph 14, does allege that Ms. Barnard drafted the letter, we retract our earlier language indicating that Ms. Mann drafted the letter.

2. Count I, to the extent it is premised on the Shakman decree, its a claim for violation of the plaintiff's "First Amendment right to vote," see Man, No. 84 C. 11020, slip op. at 5, because the Shakman litigation was premised on that right. See Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970), cert. denied, 402 U.S. 909 (1971) (plaintiffs sought relief as independent candidates and as voters).

3. Plaintiff objects to our legal conclusion that a showing that plaintiff occupied a policymaking position would defeat her claim under Shakman. See Mann, [*3] No. 84 C. 11020, slip op. at 7-8. This conclusion is based on law form which this court is in no position to deviate. See, e.g., Rubenstein v. City of Chicago, 614 F.Supp. 1412 (N.D. Ill. 1985). Therefore, we

will not at this time reconsider that particular legal conclusion.

4. Plaintiff points out that in Count II she claims violations of her First Amendment right of free association and expression, and that our opinion characterizes the count as one for free association only. See Mann, No. 84 C. 11020, slip op. at 5. We correct this mistake now and direct the plaintiff to Lehpamer, 601 F.Supp. at 1468-9, for a discussion of what she will need to prove to succeed on her free expression claims.

5., 6., and 7. The Plaintiff complains that we erred in finding that two statements she alleges were made regarding her competence cannot support a claim for deprivation of liberty under the Fourteenth Amendment. We hold to our rulings. First, plaintiff misconstrues our statement that "as to nay statements made to potential employees long after he discharge there is no cause of action." Mann, No. 84 C 11020, slip op. at 9. We did not mean to include in this category Ms. Barnard's [*4] statement that "sometimes silence speaks a mouthful." Second, we abide by well established law, articulated by Judge McGarr, that "(l)iberty is (not) infringed by a label of incompetence." Robert Reske v. City of Chicago, et al., No. 85 C 4681, slip op. at 10-11 (N.D. Ill. Jan 10, 1986).

8. The dismissal of the City of Chicago from plaintiff's equal protection claim is mandated by the fact that plaintiff has not alleged nay fact establishing a custom or policy on behalf of the City as required by Monell v. Department of Social Services, 436 U.S. 658 (1978). We suggested that the requirement could be satisfied if someone "responsible for final decision such as discharging employees" had been involved in the alleged discrimination, Mann, No. 84 C 11020, slip op. at 15, but no such allegation was made.

Lastly, "policymaking" for Monell purposes (as expanded in Pembaur v. City of Cincinnati, 475 U.S. , 106 S.Ct. 1292 (1986)), is not the same as policymaking for First Amendment purposes under Branti v. Finkel, 445 U.S. 507 (1981).

9. We agree with plaintiff that we were too hasty in concluding that if plaintiff promised not to file suit as consideration [*5] for her termination agreement, she herself had breached the contract by bringing this suit. Therefore, we retract that statement. See Mann, No. 84 c. 11020, slip op. at 12. However, while on this point we add that the term so the "alleged" contract are not clear from the complaint and request plaintiff to be more specific in exactly what she considered the contract to be.

10. Plaintiff is concerned that we correct a spelling mistake in our opinion, which the plaintiff claims is on page 12. However, we correct the plaintiff. The mistake in the spelling of a name occurs at page 16 and we note the correction.

11. The May 1986 opinion in Siakpere v. Boucher, is cited because the quote at Mann, No. 84 C 11020, slip op. at 17, came from that opinion.

Having addressed all of the points in plaintiff's motion for reconsideration, we now move on to other matters which remain to be decided. Plaintiff's Rule 60(a) motion regarding count II, pinpointing an oversight on our part, is granted.

Lastly, discovery. The plaintiff is starting to try this court's patience. We asked her to submit a discovery plan that explains why discovery is needed, see Mann, No. 84 C. 11020, slip op. [*6] at 2, "Plaintiff has asserted (and will be explaining) a need for discovery." Instead, we received a list of twenty people, "some or all" of who must be deposed,

without any description of who these people are, or any explanation for why they must be deposed. We agree with defendants that this is unacceptable and order plaintiff to submit a list of proposed proponents identifying each one and explaining why the deposition is required.

We also agree with defendants that the person files of Mr. Montgomery, Mr. O'Hara and Ms. Barnard are irrelevant to this suit and deny plaintiff's request for their production. Lastly, rather than place a numerical limit on the number of interrogatories that plaintiff and defendants may submit we prefer to strictly limit the time for discovery. A discovery deadline shall be set out at our next status call.

CONCLUSION

Plaintiff's motion for reconsideration is denied in substantial part; plaintiff's Rule 60(a) motion is granted and defendants' motion with regard to discovery is granted in substantial part.

JAMES B. MORAN, Judge, United States District Court.

*1986 U.S. Dist. LEXIS 22829, **

BEVERLY B. MANN, Plaintiff, vs. THE CITY OF CHICAGO, a Municipal Corporation, TIMOTHY O'HARA; JAMES D. MONTGOMERY; and JAYNE W. BARNARD, Defendants

No. 84 C 11020

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1986 U.S. Dist. LEXIS 22829
July 14, 1986, Decided

CORE TERMS: survive, terminated, defamation, unjust enrichment, equal protection, tenure, hired, motivating, fired, breach of contract, motion to dismiss, property interest, summary judgment, sex discrimination, legitimate reason, cause of action, policymaking, articulated, termination, salary, custom, equal protection claim, salary increase, job security, state law, inaccurate, bright, resign, Fourteenth Amendment, First Amendment

OPINION BY: [*1]

MORAN

OPINION: JAMES B. MORAN, Judge, United States District Court.

MEMORANDUM AND ORDER

Plaintiff's complaint in twelve counts charges multiple constitutional and state law violations in connection with her

discharge as an Assistant Corporation Counsel. The complaint has a chameleon-like quality, the allegations' hues changing slightly to meet the pleading standards under each count. Reading the complaint as a whole, however, two alternative models emerge: either (1) defendants had a policy of discharging those in their employ who did not support Mayor Washington and implemented this policy with respect to plaintiff by relying on performance evaluations which they knew were inaccurate and misleading to fire her; or (2) defendants had a policy of basing performance reviews on inaccurate and misleading evaluations and implemented this policy with respect to plaintiff in order to terminate her for her political affiliations. Either way, the core issues are plaintiff's performance on the job and whether her discharge was politically motivated. At the periphery are issues raised by plaintiff's liberty, property and equal protection claims. Defendants have moved to dismiss.

PROCEDURE [*2]

Before analyzing the facts in light of the law, we comment on the case's procedural nature. Plaintiff first filed in January 1985, and within six months of that time had filed two amended complaints. On July 31, 1985 defendants filed a motion to dismiss or in the alternative for summary judgment. Plaintiff responded with a third amended complaint of 49 pages, incorporating 16 exhibits. Defendants again submitted a motion to dismiss or for summary judgment. Plaintiff replied with a memorandum in opposition to defendants' motion to dismiss.

Given that both sides had submitted material outside the pleadings we could decide to treat defendants' motion as one for summary judgment under Rule 12(b) of the Federal Rules of Civil Procedure. However, neither side has complied with the briefing requirements in Local Rule 12 and plaintiff has

asserted (and will be explaining) a need for discovery, so we decline to treat the motion as one for summary judgment.

FACTS

Beverly Mann was hired as an Assistant Corporation Counsel in August 1979. By her own testimony she was hired because Mayor Byrne's husband was a friend of her father's (Mann dep. at 15). She met with a man "known as the [*3] guy who was head of patronage" (Mann dep. at 27) who put her in touch with Jim Daley, then Corporation Counsel. He gave her a "pro forma" interview (Mann dep. at 31) and she started work soon after. Like all attorneys in the office of the Corporation Counsel, Ms. Mann occupied a position expressly exempt from career service status which is the only form of statutory tenure available to city employees. Shlay v. Montgomery, et al., No. 85 C 3941, slip op. at 4 (N.D. Ill. May 7, 1985). She was assigned to the Torts Division.

Mr. Timothy O'Hara was Chief Assistant Corporation Counsel in charge of the Torts Division when Ms. Mann was hired and throughout her tenure there. According to Ms. Mann the Torts Division did not have a formal performance review process until 1983 (Mann dep. at 66). Defendants do not dispute this. However, plaintiff admits that up to and including January 1983 there were at least seven times when Mr. O'Hara criticized her performance, and several other occasions when he said she "lacked humility" (Mann dep. at 89). In January of 1983 she received a smaller pay raise than other attorneys in the office (Mann dep. at 70). In fact, she stated that, "I was the [*4] only attorney in the office other than two attorneys who had started six weeks [before the pay raise] to have gotten only a 5% increase." (Id.)

Ms. Mann's first formal performance evaluation is dated September 3, 1983 and signed by Mr. O'Hara. He rated her

satisfactory in pretrial preparation and litigation strategy, but found her performance lacking at trial. He suggested she needed to improve her relations with judges, and be more prompt. He considered her very intelligent, but found her weakest at handling pressure. He felt her performance since January 1983 had improved but that, given a choice, he would not have hired Ms. Mann.

Ms. Mann reacted to this evaluation by writing Jayne Barnard, Administrator of Personnel for the office, that:

> The evaluation procedure used by the Division Chiefs contained no safeguards to discourage the kind of abuse which I believe Mr. O'Hara engaged in when evaluating the attorneys in our division. He was not required to provide factual justification for his ratings or comments, and thus freely used the procedure as a means to increase the job security of attorneys considered loyal to him, and to place in jeopardy the jobs of those thought [*5] less personally supportive.
>
> * * * *
>
> Mr. O'Hara's system of selective memory and selective recognition rendered the evaluation results useless for legitimate purposes. He used the process as a tool for his personal advantage, thus turning it into a sham . . . .

Ms. Mann's second official performance evaluation is dated June 1984 and is signed by Mr. O'Hara. This time her rating on litigation strategy and preparation was "good," a notch up from "satisfactory." Her ability to handle pressure also seemed to have improved slightly. However, Mr. O'Hara felt that in general plaintiff's performance since September 1983 had stayed the same, and that although she was "bright," and a "good legal mind," she was "too hung up on defending

herself" and "spends more time on her accomplishments to the detriment of her assigned work." Lastly, he felt that if requested he would not rehire Ms. Mann.

On June 1, 1984 plaintiff was denied a salary increase. On September 4, 1984 Jayne Barnard informed Ms. Mann that she was being asked to resign and that if she did not resign she would be terminated. Ms. Mann did not resign. Instead, she hired an attorney. Even though she was terminated later that [*6] month, she and the Corporation Counsel agreed that a letter which she drafted would be sent to all inquiring prospective employers. The letter on the whole is very favorable, describing Ms. Mann's work as "clear and persuasive," and stating that she "sets high standards of performance and cares about her work." The letter also indicates that she resigned.

ANALYSIS

A. The First Amendment Claims

Plaintiff claims violation of her First Amendment right to vote under Shakman v. Democratic Organization of Cook County, 481 F.Supp. 1315 (N.D. Ill. 1979) (count I), and of her right to free political association (count II). She claims defendants knew she supported Mayor Byrne's 1983 candidacy for reelection and Mr. Reske's 1984 candidacy for state representative (she claims Mr. Reske's campaign was not supported by Mayor Washington or Mr. Montgomery, then Chief Corporation Counsel).

Assuming that plaintiff correctly states that political considerations are not an appropriate basis for her termination, she has the burden of proving that "political association was a motivating factor in bringing about the

discharge," Patkus v. Sangamon-Cass Consortium, 769 F.2d 1251, [*7] 1259 (7th Cir. 1985), and that "but for" her protected conduct she would not have been discharged. Hermes v. Hein, 742 F.2d 350, 353 (7th Cir. 1984). As the Seventh Circuit has stated:

> The Mt. Healthy [City School District Board or Education Doyle, 429 U.S. 274 (1977)] test allows a defendant to terminate an employee for any legitimate reason even where as in Mt. Healthy itself a reason violative of the First Amendment was also a substantial or motivating factor in the decision.

Nekolny v. Painter, 653 F.2d 1164, 1168 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982).

Plaintiff has not to date submitted any evidence that she was terminated for an illegitimate reason:

> It should also be noted that the plaintiff has the initial burden of proving by a preponderance of the evidence that the protected conduct was a "substantial" or "motivating" factor. That burden is not insignificant. A disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party, but that he favored the defendant's opponent in the election.

Nekolny v. Painter [*8] , 653 F.2d at 1168 (footnote omitted). She has not produced evidence refuting her performance evaluations. She deposed Mr. Shlay, another Assistant Corporation Counsel, who testified that Mr. O'Hara characterized Ms. Mann as "bright" (Shlay dep. at 25). However, rather than undermining the legitimacy of O'Hara's evaluations, this statement supports them. O'Hara himself

described Mann as "bright" on the June 1984 form. His criticisms were not of her mental capacity but of her personality, particularly her ability to handle pressure and criticism. Given the nature of her job, these performance problems would provide a legitimate reason for dismissal. Cf. Livas v. Petka, 711 F.2d 798 (7th Cir. 1983) (dismissal of employee who was a "disruptive force" in the office was dismissal for a legitimate reason).

Further, the timing of things provides circumstantial evidence rebutting her assertions. Her problems with Mr. O'Hara go back to at least January 1983, when she received a small salary increase, before Mayor Washington was even elected. However, we will give plaintiff the opportunity to finish discovery before we rule on whether she was fired for impermissible reasons.

There is [*9] also a question in this case whether, even if Ms. Mann's dismissal was based on political patronage, this would have been impermissible under the exception to the prohibition against political patronage articulated in Branti v. Finkel, 445 U.S. 507 (1980). See Livas v. Petka, supra, (assistant state's attorney is policymaking position); Newcomb v. Brennan, 558 F.2d 825 (7th Cir.), cert. denied, 434 U.S. 968 (1977) (deputy city attorney is policymaking position). Defendants argue as much, n1 but present no evidence to support their claim that plaintiff's position should be exempt from both Shakman and Branti. Without more than their bare allegation that plaintiff occupied a policy-making position, we cannot accept defendants' invitation to decide this issue now.

n1 While plaintiff has the propensity to argue by amending her complaint, defendants have a propensity to argue by submitting lengthy motions rather than briefing them. This

style of discourse makes it hard to give cohesion to either side's arguments.

B. The Deprivation of Liberty Claim

Plaintiff claims she was deprived of liberty without due process of law due to defamatory statements [*10] made by defendants about her which led to her discharge and which have interfered with her right to compete in the marketplace for employment within her profession (count III). Besides the alleged defamatory statements in her performance evaluations, the statements of which plaintiff complains consist primarily of Ms. Barnard saying that "sometimes silence speaks a mouthful," in response to a prospective employer's question as to why the office would not comment orally on Ms. Mann's performance, n2 and a current employee telling a prospective employer that plaintiff is "not someone you would want to hire."

n2 When Ms. Mann was terminated she reached an agreement with the Corporation Counsel office that only a letter of recommendation (which she drafted) would be shown to prospective employers. Further, the agreement stated that Mr. Montgomery was to instruct the office that in the event any prospective employer or other person called concerning the plaintiff, that person was to be referred to Mr. Montgomery; that any comments about her would be limited to the information contained in the letter of recommendation; that no additional critiques were to be placed in plaintiff's file; and that plaintiff would submit a signed letter of resignation dated September 28, 1984. [*11]

Even if these statements were made, plaintiff's claim with respect to them cannot stand. First, as to any statements made to potential employers long after her discharge, there is no

cause of action. Sudeikis v. Chicago Transit Authority, 774 F.2d 766, 770 (7th Cir. 1985). Second, as Judge McGarr recently held in a similar case:

> The stigma envisioned by the Constitution, however, does not reach all adverse comments made by a public employer about a terminated employee. Rather, a liberty interest is implicated when either (1) an individual's good name, reputation, honor or integrity are at stake by charges of immorality, dishonesty, alcoholism, disloyalty, Communism or subversive acts; or (2) the state imposes a stigma on the individual which forecloses his freedom to take advantage of other employment opportunities. Adams v. Walker, 492 F.2d 1003, 1008 (7th Cir. 1974). Liberty is neither infringed by a label of incompetence nor a failure to meet a specific level of skill which would only affect one's professional life, nor by charges which merely result in reduced economic returns and diminished prestige but not permanent exclusion from or protracted interruption [*12] of employment. Munson v. Friske, 754 F.2d 683, 693 (7th Cir. 1985).

Robert Reske v. City of Chicago, et al., No. 85 C 4681, slip op. at 10-11 (N.D. Ill. Jan. 10, 1986). Only those government actions which make an employee "all but unemployable," Sudeikis, 774 F.2d at 771 (Cudahy, J., concurring), are actionable under the Fourteenth Amendment. The statements described above do not meet this threshold and we dismiss the claim with respect to these statements.

However, Ms. Mann alleges that the defendants also stated, a month before she was fired, that she was "emotionally disturbed" and "paranoid," and that they published these statements both in the office and elsewhere. These

statements, attacking the fundamental nature of her character, are much closer to those regarding a person's morality and integrity than to those regarding a person's competence. Therefore, we will not dismiss the liberty claim with respect to these statements. However, we remind plaintiff that she must prove that these statements contributed to her firing and significantly impacted her subsequent employment options. See Paul v. Davis, 424 U.S. 693 (1976); Larry v. Lawler, 605 [*13] F.2d 954, 958 (7th Cir. 1978).

C. The Deprivation of Property Claims

Plaintiff claims deprivation of property without due process of law because (1) she had de facto tenure (count IV); (2) defendants breached their agreement not to orally communicate with prospective employers (count V); and (3) defendants have denied her compensation for the long hours and great effort she expended on behalf of the city (count VI). Unfortunately, none of these counts state a claim upon which relief can be granted as a matter of law.

Plaintiff's de facto tenure claim is based on a speech given by Mr. Montgomery, in which he allegedly "represented that all law department employees, and particularly the attorneys who met the standards of performance he then and there enunciated, would be rewarded with salary increases and job security (complaint P74). Judge McGarr, describing what appears to be the same speech, held that these representations do not rise to the level of a state-created entitlement under Board of Regents v. Roth, 408 U.S. 564 (1972):

> Plaintiff cites no statutory or constitutional authority for his interest in continued employment. Rather he relies upon [*14] the vague assurances he received from Montgomery at a meeting with all the Assistant Corporation Counsel. Plaintiff alleges that

> Montgomery told the employees that if they met certain standards of performance they would be rewarded with pay raises and job security. This court does not believe that this alleged "pep talk" by Montgomery gave rise to a "mutually explicit understanding" supporting plaintiff's right to due process prior to termination. Unilateral expectations do not create property interests . . . . In light of the clearly established state law that there is no property interest in public employment, this court finds that no property interest was created in favor of plaintiff on the basis of the alleged speech by Montgomery.

Reske, No. 85 C 4681, slip op. at 12-13 (citation omitted). We agree.

Plaintiff's breach of contract claim is based on an agreement between plaintiff and the office entered into after she was terminated and before she filed suit. n3 Defendants claim that plaintiff implicitly promised not to file suit as consideration for the agreement. If this is true, plaintiff has breached and cannot stand on the agreement to make her claim.

n3 See fn. 2 for a description of the agreement. [*15]

However, even if the agreement is considered a valid contract it does not rise to the level of a property interest protected by the Fourteenth Amendment. The agreement does not create an entitlement to continued government benefits such as welfare, see Goldberg v. Kelly, 397 U.S. 254 (1970), or public employment, see Board of Regents v. Roth, supra.

Lastly, plaintiff has no constitutionally-protected property interest in the level of compensation she thinks she deserves. As Judge McGarr found in Reske, her claim for unjust enrichment fails as a matter of state law:

> The basis for recovery of unjust enrichment is defendant's receipt of a benefit from the plaintiff which would be unjust for the defendant to retain without paying for it. Business Development Services v. Field Container Corp., 96 Ill.App.3d 834, 844, 422 N.E.2d 86, 94, 52 Ill.Dec. 405 (1st Dist. 1981). Plaintiff does not complain that defendants received a benefit from plaintiff for which [she] was not paid; plaintiff alleges that [she] was not paid enough. Plaintiff's allegations do not encompass a claim for unjust enrichment. [She] is entitled to collect [her] salary for the days [*16] [she] continued to work for the corporation counsel, but [she] is not entitled to any type of hourly award based upon [her] asserted worth in the marketplace.

Reske, No. 85 C 4681, slip op. at 13. Because plaintiff's claim fails as a matter of state law, it cannot possibly survive its transport into the constitutional arena. Bishop v. Wood, 426 U.S. 341, 344 (1976).

D. The Equal Protection Claim

Plaintiff's last constitutional claim is her weakest. She claims a violation of equal protection in part because:

> 71. No rational relationship to a legitimate governmental purpose existed for the denial of a salary increase to plaintiff in June, 1984, when most other assistant corporation counsel received such salary increases or for the forced termination of plaintiff's employment effective October 1, 1984 allegedly "for cause" and more particularly for "inadequate performance of duties" when the employment of no other assistant corporation counsel

was forcibly terminated for such purported reason.

72. No rational relationship to a legitimate governmental purpose has existed for the denial of the equal protection of the law relative to the defamation [*17] of the plaintiff by the defendants and a systematic attempt by the defendants to destroy plaintiff's reputation, career and livelihood, and the absence of such treatment with respect to other assistant corporation counsel.

(Count VII.) Plaintiff, however, forgets one small detail in her equal protection balancing test: one disgruntled employee does not a protected class make. Given the individually tailored nature of employment decisions, a public employer could not possibly function under a rule that created an equal protection offense whenever that employer treated one employee differently from the others. This part of her equal protection claim cannot stand. Harrington v. United States, 673 F.2d 7, 9 (1st Cir. 1982).

Plaintiff also alleges discrimination on the basis of sex in violation of the equal protection clause. Defendants argue that this claim is invalid because plaintiff didn't pursue her administrative remedies with the Equal Employment Opportunity Commission. However, a cause of action under §1983 for equal protection is independent of Title VII and a plaintiff suing under the former does not have to follow the administrative procedures of the latter. [*18] Trigg v. Fort Wayne Community Schools, 766 F.2d 299 (7th Cir. 1985); Zewde v. Elgin Community College, 601 F.Supp. 1237, 1244-48 (N.D. Ill. 1984).

Plaintiff charges that O'Hara singled her out for mistreatment because of her sex, and that Barnard became an active participant in the discrimination by relying on O'Hara's

actions even though she knew them to be discriminatory. These allegations state a cause of action against O'Hara and Barnard under §1983 because they were acting in their official capacity. Woerner v. Brzeczek, 519 F.Supp. 517, 520 (N.D. Ill. 1981). However, the issue of the City's and Montgomery's liability remains.

Because Trigg involved a state employer the court did not address how a sex discrimination claim under §1983 against a city intersects with the requirement articulated in Monell v. Department of Social Services, 436 U.S. 658 (1978), of proving a "custom or policy" motivating a municipal employer's allegedly unconstitutional action. It is clear that the equal protection clause protects only intentional discrimination. Trigg, 766 F.2d at 300. See also Grano v. Dept. of Development of City of Columbus, 637 F.2d 1073, 1081 (6th [*19] Cir. 1980). In this situation the "custom or policy" requirement of Monell is satisfied when the intentional discrimination is "ascribed to municipal policymakers," City of Oklahoma City v. Tuttle, 471 U.S. , 105 S.Ct. 2427, 2435 (1985), who are responsible for final decisions such as discharging employees. See Pembaur v. City of Cincinnati, 475 U.S. , 106 S.Ct. 1292, 1300 (1986); Strama v. City of Chicago, 617 F.Supp. 422 (N.D. Ill. 1985).

However, there is no allegation here that Montgomery, the only defendant occupying such a policymaking position, was involved in the alleged discrimination. Without this, the plaintiff is back to arguing that the City had a custom or policy of sex discrimination. She has not alleged such a practice. Without this allegation her treatment amounts to no more than a single incident for which neither Montgomery nor the City is liable under §1983. Strama, 617 F.Supp. at 424; Woerner, 519 F.Supp. at 521. Thus, the equal protection claim is dismissed as to them.

E. The State Law Claims

Plaintiff's state law claims come in five counts: defamation per se (count VIII); breach of contract, quantum [*20] meruit and unjust enrichment (count IX); breach of contract (count X); tortious interference with contract and with advantageous relationships (count XI); and violation of the Illinois Personnel Records Act (count XII). Defendants argue that these claims should be dismissed because they have a common nucleus of operative facts with federal claims which lack substance. Plaintiff does not respond or in any way address whether the state claims are valid and proper here.

Given our disposition of the liberty claim, we hesitate at this point to dismiss the claim for defamation per se. However, we note that plaintiff has pleaded the part of her defamation claim that relates to statements of incompetence more in the manner of defamation per quod than per se. Also, there remains the question of whether the communications were privileged. See Feinfeld v. Hayes Freight Lines, Inc., 41 Ill.2d 345, 350, 243 N.E.2d 217, 221 (1968).

Count IX for unjust enrichment cannot stand, as we held in our disposition of count VI. However, the breach of contract claim (count X) is based on the agreement regarding Ms. Mann's resignation, the contract and its breach are questions of fact incapable [*21] of resolution at this stage. Whether or not it is sufficiently related to the federal claims to be considered as a pendent claim remains to be seen. Therefore, count X is not dismissed.

Count XI alleges tortious interference with contract and advantageous relationships as against all defendants. We assume that, although plaintiff did not occupy a position with tenure, she had an employment contract with the City. n4 If this is the case, the City cannot be liable under this count, as

"a party cannot tortiously interfere with its own contract." Siakpere v. Boucher, No. 84 C 6768, slip op. at 2-3 (N.D. Ill. May 5, 1986). However, the count stands as to the other defendants, following our reasoning in Siakpere, supra.

n4 We disagree with Judge McGarr's reasoning in Reske that because no protected employment interest exists for due process purposes, no contract in the common law sense exists.

At the end of the road is count XII for violation of the Illinois Personnel Records Act, Ill.Rev.Stat. ch. 48, §§2000 and 2007. n5 Plaintiff alleges that at various times defendants knowingly placed or allowed to remain in her personnel file inaccurate information. She also alleges [*22] that she did not receive notice from defendants when they released disciplinary records in her file. These allegations, matching as they do the statutory language, cannot be dismissed at this stage.

n5 Ill.Rev.Stat. ch. 48 §§2006 and 2007 provide, respectively:

If either the employer or the employee knowingly places in the personnel record information which is false, the employer or employee, whichever is appropriate, shall have remedy through legal action to have the information expunged.

* * * *

An employer or former employer shall not divulge a disciplinary report, letter or reprimand, or other disciplinary action to a third party without written notice as provided . . . .

OTHER MATTERS

Several other issues in the case can be addressed now. First is defendants' motion to strike plaintiff's prayer for punitive damages. This motion is granted on the basis articulated by the Supreme Court in City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981). See also Reske, No. 85 C 4681, slip op. at 19.

Plaintiff's petition for a protective order and to hold **James Montgomery** in contempt of court is denied. Mr. Shlay and Mr. Reske do not need protection from [*23] adverse Corporation Counsel action to act as witnesses for Ms. Mann, as they have both been fired and are pursuing their rights and remedies by taking their claims to federal court. We also refuse to hold Mr. Montgomery in contempt of court since he has not violated any of this court's orders.

Lastly, the court grants the Law Bulletin Publishing Company's motion to quash plaintiff's subpoena of the list of law firms which place confidential advertisements in the Chicago Daily Law Bulletin. Such information was not necessary at the time it was requested because Ms. Mann's claims for defamation and deprivation of employment opportunities can at most involve the law firms she contacted, the names of which she must know, rather than all firms who advertise in the Law Bulletin.

CONCLUSION

The following lists our disposition of plaintiff's numerous claims:

(1) Counts I and II survive defendants' motion to dismiss;

(2) Count III survives only with respect to the statements that plaintiff is "emotionally disturbed" and "paranoid";

(3) Counts IV, V and VI are dismissed with prejudice;

(4) Count VII survives only with respect to the sex discrimination claim against O'Hara [*24] and Barnard;

(5) Count VIII survives;

(6) Count IX is dismissed with prejudice;

(7) Count X survives;

(8) Count XI survives only against Montgomery, O'Hara and Barnard; and

(9) Count XII survives.

L - 1

In the
United States Court for the Northern District of Illinois
(Eastern Division)
File Number 84 C 11020

Beverly B. Mann, Plaintiff,	)	
v.	)	Notice of Appeal
The City of Chicago, a municipal corporation, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard, Defendants.	)	

SECOND AMENDED NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that Beverly B. Mann, plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from an order entering summary judgment as a matter of law in favor of the defendants James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of March, 1998, and from an order entering partial summary judgment as a matter of law in favor of defendants The City of Chicago, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of August, 1991.

She also appeals from an Order entered on May 6, 1998, denying her motion for reconsideration of the entry of the summary judgments identified above.

She also appeals from an Order entered on July 14, 1986, dismissing Counts III, IV and V of the Third Amended Complaint, and from orders entered on August 29, 1986, and December 12, 1986, that declined to fully reinstate those Counts.

As the order entered on March 13, 1998, entering summary judgment on two Illinois state law tort counts, was based upon a stated finding of local governmental statutory immunity, the order appears to effectively alter Mann's legal rights with respect to the sufficiency of dismissed Counts III, IV and V, counts alleging violation of the Fourteenth Amendment Due Process Clause. In light of the March 15, 1998, order, she has filed a motion pursuant to Federal Rule of Civil Procedure 60(b) to vacate the orders of July 14, 1986, August 29, 1986, and December 12, 1986. She will present the motion on June 2, 1998.

She anticipates that that motion will be denied on June 2, 1998, and therefore appeals also from the order denying that motion.

Upon appeal, she will ask for the reinstatement of Counts III, IV and V of her Third Amended Complaint, and for the reversal of the summary judgments entered in favor of the defendants and against her on August 13, 1991, and on March 13, 1998. She will ask for a remand for trial of the counts dismissed and upon which summary judgments were entered.

Beverly B. Mann
Attorney for the plaintiff (and plaintiff *pro se*)
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

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In the
United States Court for the Northern District of Illinois
(Eastern Division)

File Number 84 C 11020

Beverly B. Mann, Plaintiff,	)	
v.	)	Notice of Appeal
The City of Chicago, a municipal corporation, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard, Defendants.	)	

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that Beverly B. Mann, plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from an order entered on June 8, 1998. That order denied her motion presented on June 2, 1998, brought pursuant to Federal Rule of Civil Procedure 60(b), to vacate an order entered on July 14, 1986, that dismissed Counts III, IV and V of her Third Amended Complaint., and orders entered on August 29, 1986, and December 12, 1986, that declined to fully reinstate those Counts.

Those counts, brought pursuant to 42 USC Section 1983, alleged the violation of the Fourteenth Amendment Due Process Clause. The counts were bought against defendants The City of Chicago, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard.

Mann also appeals from an order entered on July 1, 1998, denying her motion filed on June 16, 1998, pursuant to Federal Rule of Civil Procedure 59(a), for reconsideration of the denial on June 8, 1998, of her motion presented on June 2, 1998.

This appeal relates directly to one filed in this lawsuit on or about May 28, 1998, No. 98-2413, which arose immediately from a final and appeallable order entered by the district court on March 13, 1998, granting summary judgment in both counts remanded to it by this court in January, 1996, for retrial.

As the order entered on March 13, 1998, which entered summary judgment on two Illinois state law tort counts, was based upon a stated finding of local governmental statutory immunity, the order appears to effectively alter Mann's legal rights with respect to the sufficiency of dismissed Counts III, IV and V. An opinion issued by the Untied States Supreme Court on May 26, 1998, also appears to clarify or alter her legal rights regarding those dismissed counts. Her motion filed on June 16, 1998, was brought upon those grounds.

By this appeal, she will ask for the reinstatement of Counts III, IV and V of her Third Amended Complaint, and for remand for trial of those counts. She also will ask for a finding by this court that the district judge who entered the above-referenced orders in 1986 improperly presided in this lawsuit for nearly fours after her should have recused himself, as mandated by 28 USC Section 455, from presiding in this lawsuit and that the referenced orders entered by him therefore were entered improperly.

Beverly B. Mann
Attorney for the plaintiff (and plaintiff *pro se*)
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

L – 6

In the
United States Court for the Northern District of Illinois
(Eastern Division)

File Number 84 C 11020

Beverly B. Mann, Plaintiff,	)	
v.	)	Notice of Appeal
The City of Chicago, a municipal corporation, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard, Defendants.	)	

AMENDED NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that Beverly B. Mann, plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from an order entering summary judgment as a matter of law in favor of the defendants James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of March, 1998, and from an order entering partial summary judgment as a matter of law in favor of defendants The City of Chicago, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of August, 1991.

She also appeals from an Order entered on May 6, 1998, denying her motion for reconsideration of the entry of the summary judgments identified above.

Beverly B. Mann
Attorney for the plaintiff (and plaintiff *pro se*)
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

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In the
United States Court for the Northern District of Illinois
(Eastern Division)

File Number 84 C 11020

Beverly B. Mann, Plaintiff,	)	
v.	)	Notice of Appeal
The City of Chicago, a municipal corporation, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard, Defendants.	)	

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Notice is hereby given that Beverly B. Mann, plaintiff in the above-captioned case, hereby appeals to the United States Court of Appeals for the Seventh Circuit from an order entering summary judgment as a matter of law in favor of the defendants James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of March, 1998, and from an order entering partial summary judgment as a matter of law in favor of defendants The City of Chicago, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard in this action on the 13th day of August, 1991.

Beverly B. Mann
Attorney for the plaintiff (and plaintiff *pro se*)
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN,	)	Docket No. 84 C 11020
	)	
Plaintiff,	)	
	)	
vs.	)	Chicago, Illinois
	)	November 12, 1997
THE CITY OF CHICAGO,	)	
et al.	)	9:00 o'clock a.m.
	)	
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE WAYNE R. ANDERSEN

APPEARANCES:

For the Plaintiff: MS. BEVERLY B. MANN (pro se)
7261 North Campbell Avenue
Chicago, Illinois 60645

For the Defendant: CITY OF CHICAGO
CORPORATION COUNSEL
30 North LaSalle Street
Suite 1020
Chicago, Illinois 60602
BY: MS. NANCY VAN ALLEN

Court Reporter: ROSEMARY SCARPELLI
219 South Dearborn Street
Room 1412
Chicago, Illinois 60604
(312)435-5815

THE CLERK: '84 C 11020, Mann versus Montgomery.

THE COURT: Guess what? You are no longer the oldest case on my call.

MS. VAN ALLEN: Oh, how is that?

THE COURT: Well, Ms. Mann, you are just going to have to wait another ten years to retain that status or regain it probably. Okay. Where do we stand?

MS. VAN ALLEN: This is defendants' motion for our ruling on our motion for summary judgment which we filed at the end of July.

THE COURT: And I haven't ruled yet?

MS. VAN ALLEN: No.... Nancy Van Allen for the defendants.

MS. MANN: I am Beverly Mann for plaintiff, pro se. Your Honor, I actually am pro se right now. I ran out of money and I can't pay my attorney anymore.

THE COURT: Beverly, go to work. You are a bright, capable person. This is dogging your life. You know, I could see maybe suing the City, but you have a life besides that. I mean, come on. We spent some time together. Why are you letting your talent sit aside? Go to work. Help clients. You would be great for them. I am sure.

MS. MANN: Thank you.

THE COURT: Some of them will even pay. Run for judge.

MS. MANN: Thank you, your Honor.

THE COURT: You know, really somebody -- at some point someone has got to say this to you. I don't know what's going to happen with this lawsuit, but it doesn't make a lot of sense to have you with your talent sitting out there doing nothing. It really doesn't. I bet your mom agrees with me if she is around. So what's your response? I mean, I can rule. Do you want to file something or do you want me to study what they filed and rule, which I am happy to do. I will do it open-mindedly. I mean, I am not going to automatically take what they say as true. If you want me just to rule, then I will rule and we will know where we stand.

MS. MANN: I would rather file a response.

THE COURT: When?

MS. MANN: Can I have a month?

THE COURT: Will you get a job? Well, you know -

MS. MANN: Do you know anyone who wants to hire me?

THE COURT: I will bet you if you didn't do anything but look for a job this week, you would have one by the end of the week. Give me a break now. You know, unemployment is down to 4.8 percent. Unless there is some real problem that has never been apparent to me in the several years we have now seen each other, you know, you ought to be out there using your talents to help people and, incidentally, getting paid.

MS. MANN: Well, I guess McDonald's is looking for someone.

THE COURT: They are, and their prices keep going up. That's where I started out. You wouldn't need to eat. Just inhale the fumes. Let's say file your response by, let's say, December 5th. Okay?

MS. MANN: Yes.

THE COURT: And then a reply by December 19th. We will set a new decision date for January 21st at 9:00 o'clock. If you decide not to file, call us and let us know so that we can get working on this. It shouldn't go on forever.

MS. MANN: It already has, your Honor.

THE COURT: No. Actually, it hasn't because how old are you now? I know it's a personal – you are probably like 37.

MS. MANN: No, I Am not.

MS. VAN ALLEN: She is my age exactly, and I am not saying.

THE COURT: 34? It's a lot less than mine, and I hope to have a long way to go, a really long way to go. So do you. It's absurd for you to think that it's gone on forever and, therefore, nothing should happen with your life. Come on. Get about life for Pete's sake, really. You can really accomplish a lot.

MS. VAN ALLEN: I am saying she should tell you at least that she will think about it.

THE COURT: Maybe if you drop the lawsuit, they will hire you again. See you later. Anything else?

MS. VAN ALLEN: Since Ms. Mann is representing herself, can we for the record have a correct address so I can mail things to her? ....

(Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript of the record of proceedings in this case on November 12, 1997.

_____

Official Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN,	) Docket No. 84 C 11020
	)
Plaintiff,	)
	)
vs.	) Chicago, Illinois
	) March 31, 1998
THE CITY OF CHICAGO,	)
et al.	) 9:00 o'clock a.m.
	)
Defendant.	)

TRANSCRIPT OF PROCEEDINGS - MOTION
BEFORE THE HONORABLE WAYNE R. ANDERSEN

APPEARANCES:

For the Plaintiff: MS. BEVERLY B. MANN (pro se)
7261 North Campbell Avenue
Chicago, Illinois 60645

For the Defendant: CITY OF CHICAGO
CORPORATION COUNSEL
30 North LaSalle Street
Suite 1020
Chicago, Illinois 60602
BY: MS. NANCY VAN ALLEN

Court Reporter: ROSEMARY SCARPELLI
219 South Dearborn Street
Room 1412
Chicago, Illinois 60604
(312)435-5815

THE CLERK: Case 84 C 11020, Mann versus City of Chicago.

THE COURT: Hi, Miss Mann.

MS. MANN: Hello.

THE COURT: And Miss Allen.

MS. MANN: Good morning, your Honor.

MS. VAN ALLEN: Good morning, Judge, Nancy Van Allen for the defendants.

MS. MANN: Beverly Mann, the plaintiff. This is my motion for reconsideration of summary judgment.

THE COURT: This is a -- this -- this is a new motion, because I guess you withdraw a motion that you previously filed? Is that what -- what do you -- which motion do you want me to consider? Do you have a copy in your hand?

MS. MANN: Yes, I do.

THE COURT: Is this -- is that an extra copy?

MS. MANN: Yes, it is.

THE COURT: Okay, thanks.

MS. MANN: And I have --

THE COURT: Okay. This is one that was filed March 26th, 1998. So my suggestion –

MS. MANN: Your Honor, I have exhibits to it too.

THE COURT: Okay.

MS. MANN: They are not bound.

THE COURT: We don't want -- if you want to appeal, we don't want to blow your time to appeal by the time that it takes to review this motion. How do you suggest we deal with that? I mean I am not sure -- does -- does the motion for reconsideration toll the time to appeal the previous ruling?

MS. MANN: I -- in State Court it does. I am really not sure. I assumed it does in Federal Court.

THE COURT: I am not certain and I don't want to -- I don't want to assume that responsibility. Here is what I will do to facilitate this and maybe moot the point: I would be willing to take this home. I mean we -- I know enough about it so I don't think I need a response from the City to determine, at least at first blush, whether or not I think that the motion ought to be granted. All right? So what I am willing to do is take it home, study it, come back here within the next week. And then if I am going to deny it, I will deny it so that you can get on to your appeal and you will have preserved your record here. If I am thinking of granting it, I will advise Miss Allen of that -- Miss Van Allen of that and why. And then if she wants to fight that, we can set up a timetable for her to fight it.

But I think that that way -- I don't want your time to appeal to expire, if it might. And I don't -- I am not sure while I am considering this motion. Is that all right with you?

MS. MANN: That is fine with me, Judge. I appreciate that. The motion that I just handed you is substantially different than my initial motion. My initial motion was only seven pages long. This one is, I think, 21 or 22 pages long and has a lot of exhibits. The first one didn't have any. So it is -- it is substantially different.

THE COURT: The -- what are we doing tomorrow, Tresa, or -- and Thursday morning? I mean I don't see any -- I don't think it makes a lot of sense to sit on this. How about if we set this for 9:15 Thursday morning? Is that all right with you? And then I could -- between now and then I could have reviewed it and I will have crystallized my thoughts and then we will take it from there.

MS. MANN: That is fine with me.

THE COURT: Okay?

MS. VAN ALLEN: That is fine with me, Judge.

THE COURT: Now, you know, I -- you know, I don't know what they offered you. I really don't. And I understand your grief over the loss of the employment and some of the things that have happened in the meantime, but I don't want to -- if they are willing to pay you something substantial, I don't want -- I don't want that to just disappear. I assume that even if it is only a fraction of what you believe and may be entitled to, it is -- it is a meaningful amount that would be a lot better than nothing, whether it goes to you or to the people who have -- who have financially assisted you.

You know, I just -- I can't -- I can't avoid

saying that because it is something that has gone through my mind many times.

MS. MANN: Well, first --

THE COURT: If it is the -- if it is your creditors that you are really worried about here, I don't know to what extent they are aware of an ability to at least make some partial collection on -- on what they have advanced to help you out in this case.

MS. MANN: Your Honor, I appreciate your concern but I -- first of all, they offered me very little. Secondly, I think you have no real understanding of what this case actually is about.

THE COURT: Well, you may well be correct. So I am going to -- I will see you at 9:15 Thursday morning.

MS. MANN: Thank you.

MS. VAN ALLEN: Judge, may I make a -- just a couple of very quick points.

THE COURT: Sure.

MS. VAN ALLEN: One is we actually, I don't think, made a -- a monetary offer to Miss Mann because in the course of trying to settle this we really -- she really never was at a monetary level that we could respond to. So in fact we do have what I consider to be a fairly substantial sum that we would be willing to give her. And I will, maybe if she is willing to, talk to her when we leave court this morning.

And just very briefly on the response -- and I would appreciate an opportunity to respond to it in writing if the

Court is going to entertain it. But our position is that at this point the Court should be denying the motion outright because the first 20 -- the first 19 pages of the 22-page submission address for the first time the defendant's tort immunity argument. So that in substance this is the memorandum that should have been filed before the Judge ruled on the motion for summary judgment motion. And I don't think the rules require the Court to consider it at this point.

THE COURT: Well, after –

MS. MANN: Your Honor --

MS. VAN ALLEN: I have one other --

MS. MANN: Your Honor, they waited twelve and a half years to make their tort immunity argument. They waited twelve and a half years. They waited until after remand, after appeal, after first trial, after motion upon motion upon motion.

MS. VAN ALLEN: If I may make my other point. The last three pages are a request for the Court to reconsider a summary judgment order of, I believe it was, Judge Lindberg 19 -- back in 1993 on three federal claims that the Appellate Court has affirmed. So the law of the case bars those claims, in addition to which they are like about seven years late.

MS. MANN: Pardon me, but I have made my – raised my argument with respect to the earlier summary judgment based upon the Oncale case that was issued by the Supreme Court about three or four weeks ago. So there is no law of the case pertaining to that.

Secondly, with regard to the issue of waiver

which I did raise on the issue of tort -- of the Tort Immunity Act, I really -- I have a serious question about the ethics of Miss Van Allen's office here because they made an argument that is directly -- in my case here to you with respect to the issue of waiver -- that is directly contrary to arguments that they made in case after case after case, including in Harinek in the trial court and the Appellate Court and in In Re: Flood Litigation upon which you based your -- your -- your ruling.

THE COURT: Okay. I --

MS. MANN: Their -- their argument is directly contrary in this case.

THE COURT: The --

MS. MANN: In fact, it wasn't the law until In Re: Flood litigation was addressed by the Supreme – Illinois Supreme Court.

THE COURT: I will --

MS. MANN: But in the other cases --

THE COURT: I have got these other folks waiting.

MS. MANN: Okay.

THE COURT: I -- you know, I am going to study everything that is submitted. I mean after 12 or 13 -- after, what, 14 years why cut off debate? So I am going to -- we will reconvene Thursday morning. There is a good chance I will be here actually at 9:00. I have got a major suppression hearing. The place will be -- there

will be prisoners in custody strewn about the courtroom. So I will try to be here by 9:00.

MS. MANN: That --

THE COURT: And --

MS. MANN: That hearing will be after ours?

THE COURT: Right.

MS. MANN: Okay.

THE COURT: So I want to make sure we have 10 or 15 minutes at least. But I will study this. I will tell you what I think I should do with it. I am not going to unnecessarily try to prolong things. If I think I should deny it so that you can get the Court of Appeals to straighten me out, then I will do it so that you can get on with that. If I think -- if I think I should grant it, I will let Miss Van Allen know that. I will tell her why. And then I will listen to what she has to say about it. And if she feels that the fair thing to do to complete the record is to allow her to file something in writing, then I will -- I am sure I will give her that opportunity.

In the meantime you might check the rule on the ticking clock for the appeal because I don't want you to -- well, it is up to you, but I mean I don't -- I don't want to see anybody blow a right to appeal because of a motion to reconsider. And I am not sure under the federal rules that it tolls it. So --

MS. MANN: Thank you, your Honor.

MS. VAN ALLEN: Thank you.

THE COURT: See you.

MS. MANN: I assure you I will not be blowing my right to appeal any --

THE COURT: Well, hey, that is --

MS. MANN: But I do appreciate your concern. Thank you.

THE COURT: Okay. See you Thursday.

MS. VAN ALLEN: Thank you, Judge.

(Proceedings concluded.)

CERTIFICATE

I certify that the foregoing is a correct transcript of the record of proceedings in this case on March 31, 1998.

_____

Official Court Reporter Date

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

BEVERLY B. MANN,	)	Docket No. 84 C 11020
	)	
Plaintiff,	)	
	)	
vs.	)	Chicago, Illinois
	)	September 15, 1989
THE CITY OF CHICAGO,	)	
et al.	)	9:15 o'clock, a.m.
	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL E. PLUNKETT

PRESENT:

For the Plaintiff: MR. MICHAEL J. LEECH
Hinshaw, Culbertson –
Chicago, Illinois

For the Defendant: MS. MARIA C. CAMPO and
MR. TERRY MORAN
Asst. Corporation Counsel
180 North LaSalle Street
City of Chicago
Chicago, Illinois

Court Reporter: Joseph R. Betz
U. S. District Court
Chicago, Illinois

THE CLERK: 84 C 11020, Mann versus City of Chicago; status,

MR. LEECH: Good morning, your Honor. Michael Leech on behalf of the plaintiff.

MS. COMPO: Good morning, your Honor. Marie Compo and Terry Moran on behalf of the defendants.

MR. LEECH: I understood we were here this morning for a ruling, your Honor.

THE COURT: That's right, you are. On the defendants' position that they are entitled to go into the plaintiff's privileged conversations with her doctors, if such there are, I am going to modify Judge Balog's order somewhat and I am going to explain to you what I am doing.

I perceive that the defendants' position that they are entitled to go into all of this because the plaintiff says, "I had emotional distress as a result of the actions of the defendants," is wrong, two district courts have held it wrong, and I certainly wouldn't allow it on that basis.

Their second basis that somehow it goes to damages, I think,, is equally without merit. The place it has merit, their position has merit, is because Beverly Mann has brought a defamation claim. She says that she was called paranoid and emotionally disturbed and she says that's wrong. Well, whether the plaintiff has to prove it is wrong or the defendants have to prove it is true, and I think it's the latter, in any event that is now in issue, thus, she places it in issue. not the defendants,, by making a defamation claim out of that.

The city has the right to go into it, but there are

limits on it in terms of relevance , because if today she went and saw a psychiatrist it wouldn't have much, if any, relevance to what she was like at the time she was fired.

Thus, I have modified Magistrate Balog's order to say because of the defamation claim the defendant is entitled to go into this otherwise privileged information, but only covering a period during the time she was employed by the city and for two years thereafter. After that, it becomes meaningless or at least marginally relevant and not sufficient in my view to invade a privilege of this sort.

Now that takes care of that and the remaining question is, does she have to come back and be deposed, and I guess the question is has she answered questions about talking or getting mental help from any source during the time she was at the Corporation Counsel's Office and for a period of two years thereafter.

MR. LEECH: No, sir, your Honor.

THE COURT: She has not?

MR. LEECH: She has not.

MS. COMPO: She has not.

THE COURT: All right. That's what she has to do. She will do that within, and there in no reason to spend very much time on this -- I am staggered by the plaintiff telling me how much time has been spent on her deposition. Enough. You take her deposition on that limited point and it is not to exceed one and a half hours in length.

When is that going to be done? When is she going to be available for that?

MR. LEECH: We can do that in the next two weeks, your Honor.

THE COURT: Fine. Then we are finished with discovery in this case?

MS. COMPO: Your Honor, we are still cleaning up some matters. There are a couple of depositions that need to be taken. We only have one more deposition after that and that's the deposition of plaintiff's father, Mr. Mann, and the deposition of Mr. Blezenna. We have subpoenaed him again. We may have to go in before Magistrate Balog, because he has not shown up any time we have subpoenaed him.

MR. LEECH: Let me suggest this, your Honor, without getting into any details on it, we are one of the cases on the civil task force and Judge Bua set the case for a settlement conference, I believe, in early November --

MR. MORAN: November 15, Judge.

MR. LEECH: I think it might be a good idea if we set a date here to have the pre trial order done by that time and we can work out between us the details of getting this stuff cleaned up. If it doesn't get cleaned up, that's whoever didn't clean it up's problem. I would like to get going on the pretrial order.

THE COURT: I agree.

MR. MORAN: Judge, we have no objection to that,, and we also intend to file a motion for summary judgment. we contemplate doing that simultaneously with the pretrial order so as not to delay things.

THE COURT: What -- you know, I have read enough of this. What in heaven's name makes you think you could get summary judgment in this case? There are factual controversies all over it.

MR. MORAN: Well, Judge, I think, for example, there is a variety of different claims and I think that, for example, the defense of qualified immunity may be raised with respect to the Section 1983 count going to the termination of a government lawyer.

In addition, I think there is an absence of evidence of discriminatory intent behind all of these things. There is a variety of claims, some of which-have jury -- a right to a jury trial, others of which do not, so even if we were only partially successful, it might reduce the issues and have an impact on whether or not the case is tried before a jury or before your Honor.

MR. LEECH: Your Honor, if I could suggest perhaps if you looked at the pretrial order when it was completed you could determine whether there was any point in a summary judgment motion. I don't think there is. I don't think it's going to affect how the case is tried. I don't think at this point --

THE COURT: All right. Well, we will worry about that when I got my final pretrial order. I will see you on November 15 with pretrial rder in hand.

What time is your meeting with Judge Bua?

MS. COMPO: At 9:15, your Honor.

THE COURT: 9:15? All right. Then why don't you come and see me at 9:00 o'clock, just so you can file the pretrial order, and then you can go and see Judge Bua.

MR. MORAN: I think Judge Bua is at 9:00 o'clock, Judge.

MR. LEECH: Why don't we come in on the 14th, then, your Honor?

THE COURT: All right.

MR. LEECH: Thank you, your Honor.

MR. MORAN: What time will that be on the 14th, Judge? 9:15?

THE COURT: Yes.

MR. MORAN: Thank you, your Honor.

Transcript above certified true and complete.

_____ _____

PUBLISHER'S NOTE :

ORIGINAL PAGINATION IS NOT CONTINUOUS.

In the
United States Court of Appeals
for the Seventh Circuit

Beverly B. Mann, Plaintiff-Appellant,	)	
v.	)	Nos. 98-1936, 98-2413 and 98-2797
The City of Chicago, a municipal corporation, James D. Montgomery, Timothy D. O'Hara and Jayne W. Barnard, Defendants-Appellees	)	Dist. Court No. 84 C 11020 Hon. Wayne R. Andersen

MOTION FOR LEAVE TO SUPPLEMENT PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC* WITH A TRANSCRIPT OF ORAL ARGUMENT

The Plaintiff-Appellant, Beverly B. Mann, moves this court for leave to supplement her Petition for Rehearing with Suggestion for Rehearing *En Banc* with a transcript of oral argument in this appeal. The Petition was filed on July 21, 1999, and seeks review of an order entered on July 14, 1999.

The transcript transcribes a copy of the tape of oral argument that she ordered from the court on July 22, 1999. The tape was transcribed by a secretarial service called Special Offsite Services, which Mann learned of through its ad in the Yellow Pages. The transcript is attached to this Petition.

Mann herself has not heard the tape and, in fact, has not had it in her possession. She had assistant court clerk Chuck Branch place it into an envelope labeled "Special Offsite Services" for pick-up by messenger for delivery to that service. The transcription was completed on July 24, 1999, and e-mailed to her. The tape itself is being mailed to her.

Mann wishes the transcript included in the record of her Petition because the Petition references oral argument significantly and because she would like the transcript to be easily available to anyone interested in reviewing the record of this appeal.

Respectfully submitted,

_____

Beverly B. Mann
Plaintiff-Appellant *pro se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

August 5, 1999

By the Court:

BEVERLY B. MANN, Plaintiff-Appellant,	]	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 98-1936, 98-2413 and 98-2797	]	
v.	]	
CITY OF CHICAGO,	]	No. 84 C 11020
HAROLD WASHINGTON, JAMES MONTGOMERY, et al., Defendants-Appellees.	]	Wayne R. Andersen, Judge.

ORDER

The following is before the court:

I **MOTION FOR *EN BANC* DISTRIBUTION OF SUPPLEMENTAL AUTHORITY,** filed on August 3, 1999, by the pro se appellant.

2. **MOTION FOR *EN BANC* DISTRIBUTION OF ATTACHED SUPPLEMENTAL AUTHORITY**, filed on August 5,1999, by the pro se appellant.

On July 14, 1999, this court affirmed the district court's grant of summary judgment in favor of appellees. Appellant then filed a timely petition for rehearing with suggestion of rehearing *en banc* on July 21, 1999, which is still pending before the court. In the interim, appellant has also filed several documents, which she characterizes as citations of supplemental authority to her petition for rehearing pursuant to Fed. R. App. P. 280), and requested that the materials be distributed *en banc.*

However, contrary to appellant's interpretation of the rule, Fed. R. App. P. 280) does not automatically provide for such relief What the rule states, in relevant part, is that "[i]f pertinent and significant authorities come to a party's attention *after the party's brief has been filed-or after oral argument but before decision-a party* may promptly advise the circuit clerk of those authorities. Fed. R. App. P. 280) (emphasis added). Because a decision has already been rendered in this appeal, the rule does not, on its face, apply to this situation. But rather than reject the filings outright, the court construed them as motions for leave to file supplemental authority in support of appellant's petition for rehearing with suggestion of rehearing *en banc,* and reviewed them to determine if there was any basis for allowing appellant to file these documents.

There is not. Indeed, all of the "supplemental authority" appellant seeks to have this court consider was decided prior to the filing of her petition for rehearing with suggestion of rehearing *en banc.* In fact, appellant filed her petition seven days early, see Fed. R. App. P. 40(a)(1) ("a petition for panel

rehearing may be filed within 14 days after entry of judgment); therefore these materials could have been, and in light of her argument that the authority is relevant to the issues raised perhaps should have been, cited to in her petition. Appellant did not do so, and thus the court finds no need to consider the additional materials now. Accordingly,

IT IS ORDERED that the motions are **DENIED**.

Proceedings include all events. 98-1936 Mann, Beverly B. v. City of Chicago, et al

8/11/99 ORDER issued DENYING motion for reconsideration, DENYING motion to file supplement. [1205075-1] DENYING motion to withdraw motion to publish CR 53 as moot, in light of this court order of 8/6/99, which denied the motion. [1204288-1] [1204303-1] LH [98-1936, 98-2413, 98-2797] (heid) [98-1936 98-2413 98-2797]

8/18/99 Filed prose motion by Appellant Beverly B. Mann in 98-1936, Appellant Beverly B. Mann in 98-2413, Appellant Beverly B. Mann in 98-2797 to file additional authority [1207578-1] [98-1936, 98-2413, 98-2797] (heid) [98-1936 98-2413 98-2797]

8/23/99 Filed prose motion by Appellant Beverly B. Mann in 98-1936, Appellant Beverly B. Mann in 98-2413, Appellant Beverly B. Mann in 98-2797 to file additional authority [1208670-1] [98-1936, 98-2413, 98-2797] (heid) [98-1936 98-2413 98-2797]

8/24/99 ORDER issued DENYING the motions to file additional authority. [1208670-1] [1207578-1] LH [98-1936, 98-2413, 98-2797] (heid) [98-1936 98-2413 98-2797]

TRANSCRIPT OF APPELLATE ORAL ARGUMENT – April 23, 1999

Good morning, Your Honor, I'm Beverly Mann, the Plaintiff's Appellant. The reason that this case is on appeal right now is that there were two counts remanded for a retrial. In the summer of 1997, the Defendants filed another summary judgment motion. And eventually it was granted, the essence of it, the sole reason for the Judge's decision to -- as I understand it -- his decision to consider the summary judgment motion was that part of it was brought on a rising affirmative defense on a section of the Tort Immunity Act. That Section -- Section 2201 of the Tort Immunity Act -- provides immunity for employees serving a position involving determination of policy or the exercise of discretion but also is a requirement that the Act, for applicability of the statute, is that the Act has to be committed or done in determining policy.

One thing that I noticed in reviewing this for this argument is that -- it's something that I actually forgot -- is that, back in 1990 in an earlier summary judgment, before the first appeal -- an earlier summary judgment motion was brought. I didn't remember this, but -- one thing I forgot was that the Defendant, the City -- the lawyers on behalf of the City itself as opposed to the employees -- raised another part of

the immunity section at Section 2107 that addresses solely immunity for the Government entity as opposed to -- it's part of the Section of the Act that addresses immunity for only the Government entity as opposed to the employees. And there's a very specific section of it. It's 2107, and it provides immunity for defamation, slander and liable. And for that reason, the summary judgment was entered in favor of the City back whenever it was in 1990 or '91 -- '91 I think it was. In looking through the statute, it seems to me that this other section, dealing with employees, can't apply to defamation for employees because there's nothing in the Act about it. And the Act in that section is divided up into three parts. And one of them addresses immunity for the entities themselves. And the second one addresses immunity for the individuals, for the employees.

In other words, the Legislature did consider whether there should be immunity for employees for defamation, and decided that there should not be. And yet considered whether there should be immunity for defamation for the entities themselves, and decided there should be. I think the reason for that is something that is mentioned in one of the cases that is at issue here. It's the Illinois Supreme Court Decision *in In Re Chicago Flood Litigation* in which the Court said that the statute, if it

applies for negligence of employees, also applies for willful and wanton conduct. But it also says in there -- it's sort of adopts the wording at length from a very old case in 1897, Illinois Supreme Court case *called City of Chicago v. Seebin*. It quotes from it and from within that language it says that -- the statute does not -- I'm sorry, the statute didn't exist then. It adopted the definition from the *Seebin* case of discretion and said this was really official discretion and within the meaning of official discretion, there has to be good faith.

In Supreme Court's Justice McMorrow's decision in the Flood Litigation case, she mentions this and she says, we are clearly adopting the requirement that there be good faith. And she said -- well, she thought she was [inaudible] because she thought it was inconsistent to -- saying that she thought that willful wanton misconduct was inconsistent with good faith. I don't have to address that because my case never was about willful and wanton misconduct. It was always about bad faith. I don't think there was ever a time -- not that I can recall in this entire litigation -- in which I was alleging even negligence or willful and wanton misconduct.

Getting to the issue of the requirement of discretion and reading through the cases -- and I think the most useful case, really, is a case from 1992,

the Illinois Supreme case *Curry v. Lowe*. And that was the first case in which -- at least as far as I could tell -- that the Illinois Supreme Court said that within the meaning of discretion, or official discretion, they said it has to be official discretion not discretion as, you know, the word is used in common parlance. And it said that the act has to be unique to a particular public office. That has been repeatedly affirmed by the Illinois Supreme Court and it remains. And I believe it's there, because that's what's at the heart of the reason for the immunity statute.

THE COURT: Ms. Mann, one of the grounds given by Chicago for affirming an alternative ground to the District Court's grounds is that the jury verdict in your favor, which has actually been affirmed and paid, I gather, is fully compensatory, and therefore, any further recovery would be duplicative. Do you have a response to that contention?

MS. MANN: I understand what you're talking about, I'm sorry, for that issue. In the original trial, we tried a number of issues to the jury. And one of them was defamation and there was an instruction of issue on actual malice. And one of them was Tortious Interference and there was a bad jury instruction on actual malice on that, and so it was reversed and remanded. Both counts were.

They did raise in the first appeal this issue. I thought that had already been resolved, because they had argued it in the first appeal that the damages were the same. For one thing, the damages aren't the same by any stretch. I mean, defamation is a damage to reputation, damage to [inaudible] -- I'm saying that they blacklisted me -- is of course the issue of you know punitive damages verse the issue of -- I don't think that Tort and Contract are the same. I mean, not that I understand it. Additionally, there are issues of attorneys' fees in this case, which I raise because there are some -- originally the case had a number of civil rights counts and I raised those again because there was new caselaw on these issues. My opening brief deals extensively with those.

I might also add that when it was presented to the -- there was an equal protection count. There was a First Amendment Count. There were suppose to be Jury Counts and I'm raising those again under [inaudible] and *Sacramento v. Louis.* Actually that's going back to 1986 which count was dismissed on issue of Paret B. Taylor, I believe. I was saying that the destruction of my livelihood, really, and my professional reputation violated the due process clause. So there's an issue there of the attorneys' fees also.

THE COURT: If you want to save any time for rebuttal, this might be a good time to take a break.

MS. MANN: Thank you.

THE COURT: Ms. Nerum (phonetic).

MS. Nerum: May it please the Court. My name is Mardel Nerum on behalf of the Defendants in this action.

Your Honors, only two State law Tort claims were before the District Court after remand from the previous appeal in this case: Defamation and Tortious Interference with respect of economic advantage as to Ms. Mann's continued employment with the City.

And the District Court correctly granted summary judgment on those claims. Section 2201 of the Tort Immunity Act, the Illinois Tort Immunity Act, like the Federal Torts Claim Act, provides public employees with broad immunity from liability when their acts are discretionary. Even if they abuse --

THE COURT: That's simply discretionary, but it also has to be a matter of policy, I gather.

MS. NERUM: It has to --

THE COURT: Has the City of Chicago adopted a policy of defaming its former attorneys?

MS. NERUM: Certainly not, Your Honor. But --

THE COURT: And how -- what's the policy involved in the defamation branch of this case?

MS. NERUM: Well, it is not the type of policy that involved in *Lonell* or other cases that involved that type of applicable policy. Policy, for purposes of Section 2201, has been defined by the Illinois Supreme Court as a determination that requires a decision balancing competing interests and then making a judgment call as to what solution serves those competing interests. And under this definition --

THE COURT: But that sounds like it's just the same as discretion. Right? Is there any situation in your understanding that would entail discretion but not policy?

MS. NERUM: Well, I hadn't thought of it exactly --

THE COURT: Presumably, if you write this down in a statute, it has to be policy and discretion. There must be some things that have policy but not discretion. Some things that have discretion but not policy.

MS. NERUM: There certainly may be --

THE COURT: You have defined the two as synonyms.

MS. NERUM: Well, the Illinois Supreme Court has defined them in that way. The definition I just quoted you is from the *Harrineck* Decision in 1997 or 1998 Supreme Court Decision by the Illinois Supreme Court. That is how it has defined policy. And in that case, the Illinois Supreme Court held that a Fire Marshall's decision where to direct an individual to stand during a fire drill was both a discretionary act and a determination of policy within the meaning of Section 2201.

And in the Chicago Flood Litigation, the Illinois Supreme Court held that the Decision where to drive a set of piles in the river, and a decision whether and when to make repairs, was both a matter of discretion, a discretionary act in the meaning of 2201 and a determination of policy within the meaning of 2201. It's clear that when you look at these Decisions and how they apply the definition to the facts in those cases, that policy within the meaning of Section 2201 does not mean a broadly applicable policy decision. But it simply means a decision that requires someone to balance a competing interest which is what they believe is the best solution.

These acts do fall within that definition. At least as to form a

corporation council James Montgomery's Decision to discharge Ms. Mann, it required him to balance the interests of the City in obtaining the legal representation. The interests of the City in operating a Law Department, and Ms. Mann's interests in [inaudible] employment, along with her strengths and weaknesses as an attorney to make a judgment call on whether to retain her or discharge her.

Ms. Mann's performance evaluations also involved a policy determination under this definition. Because employee evaluations serve a variety of competing interests as this Court has recognized. They make an objective evaluation of employees. They can be used to build morale and to motivate employees. So a supervisor who is evaluating an employee's performance must balance his competing interests and make a judgment call on how to best serve those interests. Thus, under the definition supplied by the Illinois Supreme Court to Section 2201 of the Tort Immunity Acts, these Acts are both discretionary in a determination of policy. And Mr. Montgomery and Mr. Bernard and former Chief Assistant Corporation Council, Timothy O'Hare from the Tort's Division, are immune from liability for the decision to discharge Ms. Mann, tortious interference with perspective economic advantage and for

defamation as to her performance evaluations.

Which leaves a single claim on this case which is a portion of Ms. Mann's defamation claim concerning the former first assistant corporation council, Jane Bernard's comment to Judge Meachum when he called from the United States Trustee's Office for a reference on Ms. Mann. At that time, Ms. Bernard said, "Sometimes silence speaks a mouthful." And although the District Court granted summary judgment on that comment on the basis of Section 2201, along with all the other claims, this Court should affirm it on alternative grounds. It's entered in the Motion and also on the grounds as you know-Judge [inaudible] said in our brief. As to that comment, Ms. Mann has already recovered damages. That was the sole basis of her breach of contract claim for which she has collected a Judgment and that fully compensates her for that comment.

But there is also a legal basis for affirming the District Court's Decision on that comment. Ms. Mann's defamation claim in this case has throughout been a claim for defamation, per se, under Illinois law.

-But a statement that falls within one of the four limited categories of defamation, per se, is not actionable if it is capable of an innocent construction. And whether a statement is

subject to an innocent construction, is capable of an innocent construction, is a question of law. Illinois Courts have held that a comment that is capable of being construed to mean that an employee or a former employee did not fit in well with the employer's organization is not actionable as defamation, per se. And they have held that comments far more pointedly critical of a former employee than Ms. Bernard's very vague comment about Ms. Mann can be innocently construed and are not actionable.

For example, the Illinois Supreme Court has held that the comment that an insurance agent was a lousy agent was capable of innocent construction that the agent didn't perform well in their particular job. And the Illinois Supreme Court has also held that the comment that an employee did not follow up on assignments was capable of an innocent construction and, therefore, has held that these statements were not actionable as defamation, per se. While Ms. Bernard's comment, "Sometimes silence speaks a mouthful," can be construed to mean something non-innocent, it is clearly capable of an innocent construction that Ms. Mann did not fit in well in the City's Law Department. And therefore, under Illinois Law, it's not defamatory.

If there are no further questions, we ask that this Court affirm

the Judgment of the District Court. Thank you.

THE COURT: Thank you counsel. Anything further Ms. Mann?

MS. MANN: Getting back to the question that Your Honor asked me before about contract. The contract address, not what happened while I was working there, but it would address what happened afterward. There were specific things that they were supposed to do, and they didn't do them. Montgomery was supposed to answer calls and say certain things, but instead the calls were directed to Jane Bernard and she said some things. That's what the breach of contract had to do with it. It didn't have to do with what happened to me while I was working there. Just the aftermath of it.

Secondly, the innocent construction rule, it seems to me, is something that should have argued many, many years ago. This is a case that has been pending for 14 years. It was never argued before. I don't think the law has changed at all on this that I know of. Second, certainly the Defendants didn't take it as innocent or they said they didn't, because they fired me because of it, even though Montgomery said, well he knew these things weren't true, yet he was firing me because of it.

The issue of whether I didn't fit in or not, that's what O'Hara said and

that's not what the subject of my defamation counts is. My defamation count is very specific about certain things that he said in his performance evaluation and it wasn't, "she didn't fit in." There's a case as far as competing interests -- there's no factual presumption at all. There's no presumption of law that what a person says in employment defamation or employment evaluations is accurate. That's the basis of what they said. These have all been looked at. These are things that they said originally in the earlier appeal, and they were reversed. And they also set in the earlier motions for summary judgment and that was denied. And the only reason we're here now and the only reason that Judge Anderson said they could even file a motion for summary judgment, and the only reason that they're saying they can file a motion for summary judgment, is supposedly new caselaw on the issue of willful and wanton. It doesn't even have anything to do with my case. I never argued willful and wanton. I argued deliberate harm. Can I just say one more thing? Thank you.

The very nature of tortious interference, actually the US Supreme Court wrote an opinion recently on this issue, it's called *Hattle v. Garrisons* was issued in December. And in that case, Justice, I think, Renquist really discussed the issue of employment

defamation and employment tortious interference and actually malice, I believe. He got into the issue of somebody saying something to serve his own interests.

THE COURT: We're familiar with that Decision. I think we have your points. Thank you very much Ms. Mann.

MS. MANN: Thank you.

Q - 18

Order

JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY COMPLAINT FORM
[It is to be two pages, printed on one-side only.]

MAIL THIS COMPLETED FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 219 SOUTH DEARBORN STREET, CHICAGO, ILLINOIS 60604. MARK THE ENVELOPE, "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED.

1.) Complainant's name: Beverly Mann

Address: 7262 North Campbell Avenue,
Chicago, Illinois 60645

Daytime telephone: (773) 465-4587

2.) Judge complained about:

Name: Frank H. Easterbrook

Court: Court of Appeals for the Seventh Circuit

3.) Does this complaint concern the behavior of the judge in a particular -lawsuit or lawsuits? (Complaints may not be directly related to the merits of a decision or procedural ruling.)

[x]Yes [ ] No

If "Yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: Court of Appeals for the Seventh Circuit

Docket Number: 98-1936, 98-2413, 98-2727

Are (were) you a party or lawyer in the lawsuit?

[x] party [ ] lawyer [ ] neither

If a party, give the name, address, and telephone number of your lawyer:

Pro se

List docket numbers of any appeals to the Seventh Circuit:

Additionally nos. 92-3761 & 92-3797

4.) Describe the conduct or evidence of disability that is the subject of this complaint. See Rule 2 (b) and (d). If you need more space, use sheets of paper the same size as the complaint form.

The court's entire handling of this appeal since I filed my Petition for Rehearing with Suggestion for Rehearing en Banc on July 21, 1999, has been riddled with oddities, including the denial of my *instanter* motion for leave to supplement my appendix to my petition (which was filed seven days after the Rule 53 order was issued) with a transcript of oral argument in the case, notwithstanding that the motion was filed only 12 days after the issuance of the order resolving my appeals. Judge Easterbrook, alone, ruled upon the motion and also alone denied a motion for reconsideration of it and for a ruling by the full panel. At oral

argument I had told the panel that my allegations always were of deliberate injury rather than of willful and wanton misconduct, and I had referenced the adoption by the Illinois Supreme Court in *In re Chicago Flood Litigation*, 176 Ill. 2d 179 (1997), of the rule of law stated in an 1897 opinion of that court that denied immunity to government employees for deliberate misconduct, and a statement in a dissent in that case that repeated that rule of law and argued that it applied as well to willful and wanton misconduct. The summary judgments entered after remand for retrial of two counts were based ostensibly upon *Flood Litigation*, and this court's unpublished order relied upon it in affirming those summary judgments. I also told the court at argument that the issue of "duplicative" damages for tort and for breach of contract was resolved in the earlier appeal because the defendants had raised it then. The significance of this is evident in the Rule 53 order issued on July 14, 1999, a copy of which I enclose along with this form.

Another oddity: That judge blocked distribution to the *en banc* court of several F.R.A.P. 28(j) submissions during the pendency of my petition for *en banc* hearing, accomplishing this by assigning a particular docket-entry clerk to handle all submissions by me and to deliver them only to him. That judge's unconventional conduct since the issuance of the July 14, 1999 order belies his stance of comfort with the manner in which the appeals were handled and resolved. (It also is incredibly adolescent.)

The above is a first-person rephrase of statements contained in a draft petition for writ of certiorari that is due by January 1, 2000, and that I will file shortly in its present form if my pending application for leave to file it in its oversized length is granted. I enclose a copy of a memo I sent to docket-entry clerk "heid" asking her to docket my Rule 28(j) submissions correctly; I thought the problem was caused by her inadver-

tent error. After I sent the memo, I received an order advising me that it was the court itself that had ordered the wording of the docket entries because, the order said, Rule 28 (j) doesn't apply to petitions for rehearing. My first Rule 28(j) submission initially was not docketed at all. Only when I resubmitted it and, assuming that the earlier one simply was lost, a desk clerk agreed to personally distribute the submission to the en banc court, was that submission docketed at all – as a motion for leave to file it.

I enclose along with this complaint a copy of my draft certiorari petition. The petition is substantially longer than Supreme Court rule permits, but I have applied for leave to file it at its current length. The first two Questions Presented in it ask:

1. Whether federal appellate-court application of the doctrines of the law of the case and of waiver of claims and defenses, as delineated in nearly 60 published opinions issued by that same appellate court within the last five years and by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Teague v. Lane*, 489 U.S. 288 (1989), is mandatory or is instead merely optional, and whether, when those doctrines are asserted in a successive appeal *after fourteen years of litigation*, the appellate court is entitled to ignore them as long as it resolves the appeal via unpublished (and mostly unexplained) order.

2. Whether a federal circuit rule that permits the resolution of appeals by unpublished order may entitle an appellate court to evade the application of extensive pertinent settled law to arbitrarily selected cases, or whether, instead, a federal appellate court's use of that device as a vehicle by which to exempt some cases from application of the law actually creates two parallel bodies of law utterly independent

> of one another and thus violates the fundamental dictate of the Fifth Amendment's Due Process Clause.

On November 16, 1999, I filed a motion with appellate court titled "Motion to Recall the Mandate and for Clarification or Other Revision of a Circuit Rule 53 Order, and for Clarification of Court Policy Concerning Petitions for Rehearing with Suggestion for Rehearing en Banc." I stated that needed the clarification in part because the amorphous nature of the court's order required me to present numerous questions in the alternative in my certiorari petition to the Supreme Court; I said that I simply was unable to "discern from the language of the July 14, 1999, order whether the statements in the last five paragraphs of that order are intended as statements of law or, instead, as findings of fact based upon *de novo* review of the evidentiary record." But I also said this:

> [Mann's need for clarification] is not solely for purposes of her Petition. She also needs clarification because of the effect upon her of what appear to be largely findings of *fact* by operation of a governmental immunity statute, an operation of law that she asserts in her Petition violates the Fourteenth Amendment's due process guarantee and the Seventh Amendment's guarantee to jury determination of questions of fact. She argues in her Petition that this court's July 14, 1999, order reads as findings of *fact* (albeit apparently by operation of Illinois statute) that the defendants' defamatory statements and interference with her employment were made objectively and with justification in the interest of the City of Chicago.

On November 23, I had filed a motion to supplement my motion to recall the mandate, etc., which was never docketed. My motion was denied without explanation in an order dated

November 29, 1999 – the same order that granted my motion for leave to file the motion, which was 37 pages long. The order was typed in the format used by law clerks when they rule upon routine motions, rather than the format used by judges.

On the same day, that court in a published opinion authored by Judge William Bauer, a member of the panel in my appeals, and in which Judge Easterbrook concurred, wrote:

> We have concluded that this case presents a question of state law best left to the Illinois Supreme Court to answer. Circuit Rule 52 provides, in relevant part, that "[w]hen the rules of the highest court of a state provide for certification to that court by a federal court of questions arising under the laws of that state which will control the outcome of a case pending in the federal court, this court, sua sponte or on motion of a party, may certify such a question to the state court in accordance with the rules of that court, and may stay the case in this court to await the state court's decision of the question certified." Certification to the Illinois Supreme Court is proper when "there are involved in any proceeding before [the Seventh Circuit] questions as to the law of this State, which may be determinative of the said cause, and there are no controlling precedents in the decisions of this court. . . ." Ill. Sup. Ct. R. 20. We therefore certify the question raised by this appeal to the Illinois Supreme Court.... We respectfully request the Illinois Supreme Court to answer the following question of law:
>
> > Does section 9-102 of the Illinois Tort Immunity Act provide for attorney's fees against municipalities within its definition of compensatory damages? See (See *Yang v. City*

of Chicago, Nos. 98-4238 and 98-4330, 7th Cir. Nov. 29, 1999.)

The November 29, 1999, order denying my motion to recall the mandate appears to have been backdated by a day, a point of significance given the release of *Yang* on November 29 and the overlap of Judges Easterbrook and Bauer as panel members in the two appeals; the November 29 order was not reflected on the court's web-site docket listing for the case as updated at 11:01 a.m. on November 30, but did appear on the docket listing that afternoon. (I printed copies of the docket listing as of 11:01 a.m. on November 30, on which it was not entered, and the docket listing as of 1:01 p.m. on November 30. See Appendix at A - .)

This recalls, for me, Judge Easterbrook's manipulation of the release, two days after the issuance of the mandate in my appeals, of the opinion he authored in *Neal v. Honeywell, Inc.*, Nos. 98-1728 and 98-3162, argued on May 17, 1999, three weeks after argument in my appeals. The opinion in *Neal,* which I discuss at length in my certiorari petition and in which another member of the panel in my appeals concurred, directly conflicts with three rulings in the July 14, 1999, order in my case.

On December 2, I submitted a motion titled "Motion for Reconsideration of Denial of Motion to Recall the Mandate and for Clarification of Order, and for Ruling by Three-Judge Panel." That motion asked the court to reconsider its ruling in light of *Yang* and also in light of an intermediate opinion issued by the Supreme Court on November 30, 1999, in *Fiore v White*, 09-942, a case I had mentioned in my motion to recall the mandate as presenting questions similar to those in my motion. An excerpt from that motion reads:

> Mann's underlying motion was 37 pages long and was submitted along with a motion for leave to file it. It referenced several exhibits, including transcripts of three district court hearings. The exhibits were submitted a few days later along with a motion to file them. On November 23, Mann submitted a two-page supplement to that motion. On November 29, she submitted an additional exhibit, a draft copy of her Supreme Court petition, along with a motion for leave to file it.

The order denying that motion also granted the motions for leave to file it and the initially-submitted exhibits; the underlying motion, in other words, was denied at the same time that leave was granted to file it. It seems unlikely that three judges could have read and considered the motion and its exhibits in a minute or two.

My motion was returned to me by mail, accompanied by a cover letter from the court's *pro se* clerk that reads:

> I am returning this motion to reconsider an order that denied your motion to recall the mandate. There is no further consideration of an order denying recall of the court mandate in this court. These closed cases remains [*sic*] closed and no further filings can be made in these closed appeals. Further review of the courts [*sic*] decision and any orders of the court would be made by filing a Writ of Certiorari directly with the U.S. Supreme Court.

How convenient, and coincidental, that the order denying my motion was dated November 29 rather than November 30.

My certiorari petition also describes apparent irregularities in the panel's handling of the appeals *before* it issued its

July 14, 1999, order, irregularities evident in the order itself. An excerpt from my petition reads:

> The July 14, 1999, order, although short, is replete with neon signs advertising the court's unabashed ignorance of the specifics of this lawsuit and the arguments presented in the appeal. One sign is the order's erroneous characterization of the operative complaint as alleging willful and wanton misconduct rather than deliberate misconduct. Another is the erroneous statement that that court's order in the initial set of appeals had discussed the evidentiary record in the case. Another is the order's *two* references to key defendant Jayne Barnard as "he." And another is the order's erroneous statement that Mann did not allege the publication of statements not found in her personnel file; the sentence, "Sometimes silence speaks a mouthful," appears nowhere in Mann's personnel file.
>
> Most startling, the order suggests that the court did not even know *the chronology of the earlier set of appeals in relation to the trial in the case and the filing and resolution of the earlier summary judgment motion* – the one filed and resolved *before* the first set of appeals.
>
> Mann was entitled to genuine appellate review but, courtesy of that court's Rule 53(c), received instead a sort of parody of it; two of the appellate panel members passed through *two* appeals in her case so utterly disengaged from the facts and allegations in it that they did not even know the gender of a key defendant. Or perhaps they just didn't bother even to read the order, drafted undoubtedly by a law clerk, before it was issued in their name, inasmuch as its contents, other than its bottom line, didn't concern them. Had the order referred to Mann as a monkey, they would have signed onto that, as well.

> She never fails to illicit a smile or a chuckle from attorneys and lay acquaintances alike when she asks them to try to imagine the appellate court treating an appeal – any appeal – argued by, say Jenner & Block, in the manner in which that court treated her appeals, *either set* of her appeals.
>
> Mann's father, who early in his career as a journalist for the Chicago Daily News covered the Cook County courts and then the federal courts in Chicago, has remarked that the courts' treatment of this case virtually throughout its pendency recalls the machine-dictated outcomes of politically tinged lawsuits in Cook County court in the late 1940s and early 1950s but bears little resemblance to *federal court* custom of that era. Perhaps his memory is faulty.

Also from my certiorari petition:

> The statement in the court's July 14, 1999, that, "[i]n her most recent appeal, Mann raises a laundry list of issues" – a patronization intended to imply that the lawsuit itself was frivolous and that Mann had quite some nerve in bothering the high priests with it a second time – failed to note that the earlier appeals were not just Mann's but also were the defendants, and that the defendants *lost* on *their* arguments that Mann's tortious interference count failed to state a claim and that, in any event, her claim was not supported by the evidentiary record.

The evidence is unequivocal that the panel handled my appeals in a manner that conflicts with the following representation in the Introductory Note of your court's handbook:

> In recent years the number of appeals docketed in the Seventh Circuit has greatly increased and the number of filings that take place in each appeal have also proliferated. The judges must read the appellant's brief, the appellee's brief, the reply brief, if any, and the pertinent portions of the appendix or record on appeal in each of the six appeals that are orally argued daily. Further, the average appeal has several motions on its docket both prior to and subsequent to oral argument. Responses are filed to many of these motions. All of these documents must be read, consuming a vast amount of judicial time.

I have submitted a "Motion Pursuant to F.R.A.P. 27(c) for Review by the en Banc Court or by a Three-Judge Panel" requesting review of Judge Easterbrook's denial of my motion to recall the mandate and for clarification. Judges Ripple and Bauer, the other two panel members in my appeals, failed to accord me even minimal due process, as I note in one of the above excerpts from my certiorari petition and as I demonstrate with precision elsewhere in my petition; throughout my petition, I juxtapose portions of the order issued in my appeals with statements of law contained in published opinions authored respectively by the three judicial panel members in my appeals. I harbor no illusion about their possible sudden adherence to obligation in this case, but I ask that they place their names upon an order denying my motion.

I know of no way even to try to prevent Judge Easterbrook from commandeering that motion as he has everything else I have filed in the appeals since July 21, 1999, other than to submit this complaint.

I declare under penalty of perjury that --

(1) 1 have read Rules 1 and 2 of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

Signature

_____

Date executed

December 6, 1999

December 10, 1999

Paul A. Grossman
Deputy Clerk
United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: Correction to judicial misconduct complaint against Judge Frank H. Easterbrook

Dear Mr. Grossman:

I wish to correct a statement contained in a judicial misconduct complaint that I submitted on December 6, 1999, against Judge Frank H. Easterbrook.

The following sentence appears in that complaint, in the second-last paragraphs on page 3:

> On November 23, I had filed a motion to supplement my motion to recall the mandate, etc., which was never docketed. That motion was docketed, but not until after the underlying motion to recall the mandate was denied. The, apparently on December 1, the motion to supplement was inserted into the computer docket listing. (See the accompanying three print-outs of the docket listing as it appeared in sequence on this court's web site.)

Very truly yours,

Beverly Mann
7261 North Campbell Avenue
Chicago, Illinois 60645

JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY COMPLAINT FORM
[It is to be two pages, printed on one-side only.]

MAIL THIS COMPLETED FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 219 SOUTH DEARBORN STREET, CHICAGO, ILLINOIS 60604. MARK THE ENVELOPE, JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED.

1.) Complainant's name: Beverly Mann

2.) Address: 7262 North Campbell Avenue
Chicago, Illinois 60645

Daytime telephone: (773) 465-4587

2.) Judge complained about:

Name: Wayne R. Andersen

Court: District Court for the Northern District of Illinois, Eastern Division

3.) Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits? (Complaints may not be directly related to the merits of a decision or procedural ruling.)

[x]Yes [ ] No

If "Yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: District Court for the Northern District of Illinois, Eastern Division

Docket Number: 84 C 11020

Are (were) you a party or lawyer in the lawsuit?
[x] party [ ] lawyer [ ] neither

If a party, give the name, address, and telephone number of your lawyer:

Pro se

List docket numbers of any appeals to the Seventh Circuit:

98-1936; 98-2413; 98-2727; 92-3761; 92-3797

4.) Describe the conduct or evidence of disability that is the subject of this complaint. See Rule 2 (b) and (d). If you need more space, use sheets of paper the same size as the complaint form.

This complaint concerns Judge Andersen's handling of a summary judgment motion filed twelve and one-half years after the lawsuit at issue was filed, and after remand for retrial of two state-law counts, an employment-related defamation and employment-related tortious interference counts, upon a rejection by the appellate court of the defendants' assertions of insufficiency of evidence to support a finding of actual malice as defined for those torts by Illinois law. On two occasion, one at a hearing on November 12,

1997, the other in a memorandum opinion issued on March 13, 1998, he materially misrepresented to me the procedural and substantive manner in which the summary judgment motion and a subsequent related motion would be handled. He also repeatedly and intensely, before and after he granted the summary judgment motion, pressured me to accept a small settlement award in the case.

At a hearing on November 12, 1999, the judge told me that I need not file a response to the motion because, he said, he would not simply accept as accurate the assertions in the motion. At that hearing, also pressured me to settle the case, telling me that with my "talent" I should be spending my time on more worthwhile things. I enclose a transcript of the November 12, 1997, hearing.

That transcript does not reflect mere stray comments by that judge but rather comments that he reiterated in one after other hearing and conference, including at one hearing (also on the record) in which he told me that he thinks about my case when he's driving in his car. His thoughts: I needs to stop litigating the case and accept any settlement offer tendered because I is wasting my talents litigating it; I should be spending my time on other things.

I did file a response to the summary judgment motion. My response stated that all defenses either were already litigated in the earlier cross-appeals and were determined in my favor or were waived as available, if at all, before resolution of those appeals. In February, 1998, the defendants moved to strike my response for failure to comply with local Rule 12(n) requiring a fact-by-fact rebuttal to the assertions of fact in the summary judgment motion. At the hearing in which defendants counsel presented that motion, the judge told me that I did not have to respond to that motion either, but shortly afterward issued an order requiring me to comply

with local Rule 12(n) within 14 days. I moved for reconsideration of that order, stating that years earlier, in 1991, I had complied with Rule 12(n) in response to a summary judgment motion, which was denied on the defamation and tortious interference counts, and that the defendants were presenting no new information in their new summary judgment motion.

At a settlement conference he held in chambers on March 12, 1998, he chided me for what he said was my "obsession" with this lawsuit. When I asked him why he was pressuring only me and not the defendants to compromise, he said, "Because, Beverly, it's been my experience that current City administrations aren't willing to pay a lot of money for the wrongdoing of earlier administrations." He said my injury "wasn't so terrible;" it was not, he said, like what was happening to people in Kosovo. He explained that his daughter "is in love with an ethnic Albanian" from Kosovo, and said, "Now *that's* terrible." He also told me that he himself was fired from his first job as an attorney, a political appointment, for political reasons, and that he was angry but that he recovered from it. The next day, he granted the summary judgments, in a memorandum opinion that included the following:

> **III. Defendants' Motion to Strike Plaintiff's Response to Defendants' Motion for Summary Judgment and Plaintiff's Motion for Reconsideration of this Court's Order Entered on February 17, 1998**
>
> Because we have granted the motion for summary judgment due to the change in Illinois law, Plaintiff need not submit a 12(n) statement. Thus, Defendants' Motion to Strike Plaintiff's Response to Defendants'

> Motion for Summary Judgment is denied and Plaintiff's Motion for Reconsideration is granted.

I filed a motion for reconsideration of the summary judgments. In a memorandum opinion he issued on May 5, 1998, denying my motion, he purported to find that the defendants had spoken and acted objectively and in the best interest of the City of Chicago in defaming me and firing me (notwithstanding that neither count was a wrongful discharge count under Illinois law). The only alteration of fact that occurred in this case between the date of issuance of the March 13, 1998, memorandum opinion in which he initially granted the summary judgments but also said the facts in the case already were determined sufficient to support a jury verdict in my favor, and his issuance of the May 5, 1998, memorandum opinion was that at the March 31 hearing I would not capitulate to the judge's pressure and agree to settle the case. I enclose a transcript of the March 31, 1998, hearing, and copies of the March 13, 1998, and My 5, 1998, memorandum opinions.

In my appellate briefs, I discussed the judge's comments.

Judge Andersen predicted accurately that as a *pro se* appellant in a civil lawsuit, I would receive only rubber-stamp appellate review of his rulings, so he did what suited his convenience.

I declare under penalty of perjury that --

(1) I have read Rules 1 and 2 of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

Signature

_____

Date executed

December 6, 1999

JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY COMPLAINT FORM
[It is to be two pages, printed on one-side only.]

MAIL THIS COMPLETED FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 219 SOUTH DEARBORN STREET, CHICAGO, ILLINOIS 60604. MARK THE ENVELOPE, "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE. SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED.

1.) Complainant's name: Beverly Mann

Address: 7262 North Campbell Avenue, Chicago, Illinois 60645

Daytime telephone: (773) 465-4587

3.) Judge complained about:

Name: James B. Moran

Court: District Court for the Northern District of Illinois, Eastern Division

3.) Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits? (Complaints may not be directly related to the merits of a decision or procedural ruling.)

[x]Yes [ ] No

If "Yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: District Court for the Northern District of Illinois, Eastern Division

Docket Number: 84 C 11020

Are (were) you a party or lawyer in the lawsuit?

[x] party [ ] lawyer [ ] neither

If a party, give the name, address, and telephone number of your lawyer:

Pro se

List docket numbers of any appeals to the Seventh Circuit:

98-1936; 98-2413; 98-2727; 92-3761; 92-3797

4.) Describe the conduct or evidence of disability that is the subject of this complaint. See Rule 2 (b) and (d). If you need more space, use sheets of paper the same size as the complaint form.

This complaint concerns Judge Moran's decision to retain assignment of my lawsuit for nearly four years, issuing three memorandum opinions dismissing counts in the complaint and issuing other significant orders in the case, notwithstanding his close family relationship with one of the defendants, Jayne W. Barnard. I believe that 28 U.S.C. § 455 required that judge's recusal from the case. These events occurred more than a decade ago but ultimately determined the outcome of the case on July 14, 1999, in an unpublished order issued by your court.

I enclose a copy of the argument and the "Citations to Unpublished Orders" sections of my current draft of a certiorari petition that I will file with the Supreme Court next week. The argument section states the relationship between Judge Moran and Barnard and the judge's inappropriate conduct in the case, and illustrates the effect that conduct had upon the outcome of the litigation. An excerpt, which details the first two of these, reads:

> Mann filed this lawsuit in the wake of the "silence speaks a mouthful" incident.[involving defendant Barnard]. The case was assigned to District Judge James B. Moran, who repeatedly, including twice in Mann's presence, instructed the defendants' counsel to file a dispositive motion. Mann each time responded but filing a more detailed amended complaint, ultimately a 48-page one with 16 exhibits. The judge then issued an order stating that he would treat the defendants' pending Fed. R. Civ. P. 12(b)(6) motion as a Rule 56 motion. Mann promptly discharged her contingent-fee counsel and retained hourly-fee counsel who had recently won a case before the Supreme Court. The judge rescinded his order and issued the series of 1986 orders identified above. (App. at A -).

The orders state that employment blacklisting by government officials does not constitute a violation of the Fourteenth Amendment and that Mann's detailed complaint and exhibit failed to establish pretext or defamatory inaccuracy by the defendants.

Two years later, that judge recused himself when Mann learned that he and defendant Barnard, through series of marriages and divorces, shared four stepchildren who had lived with the judge and his wife, and that Barnard and the judge saw each other regularly at family social events.

> The case then was assigned to a judge who stated that it was an inappropriate case for summary judgment because it was replete with factual controversies. Shortly afterward, it was reassigned again, to a newly confirmed judge. The procedural history thereafter is summarized above, in the section titled "Citations to Unpublished Orders."

Barnard's current husband and the judge were neighbors in the mid-1970s, and swapped spouses. One of the marriages dissolved after a few years, and Barnard and the double-ex-husband married.

His three memorandum opinions are recorded, respectively, at 1986 U.S. Dist. LEXIS 22829 (Jul. 14, 1986); 1986 U.S. Dist. LEXIS 20968 (Aug. 29, 1986); 1986 U.S. Dist. LEXIS 16517 (Dec. 12, 1986) (84 C 11020 N.D. Ill.).

His impact upon the outcome of the case extends well beyond the dismissal of several counts including a seminal substantive due process count. He refused for three years to issue a discovery case management order, stating at one after another status hearing, month after month, that he would do so the following month. Nothing of importance occurred at those hearings; he simply was trying to run me out of money to pay attorneys' fees before the case reached appeal, a purpose at which he succeeded. He also significantly restricted the length of the defendants' depositions, and other discovery I requested, while allowing unlimited deposition questioning of me, ultimately in four day-long sessions over a period of more than three years. Finally, after he recused himself, my attorney moved to end my perennial deposition. The newly assigned judge, Paul Plunkett, expressed astonishment at the amount of deposition testimony I was forced to give. I enclose a copy of the transcript of that hearing on September 15, 1989.

In light of this court's order in *USA v. Miriam Santos*, No. 99-2934, directing counsel for the amici curiae to show cause why the amicus curiae brief filed by that counsel should not be ordered stricken for failure to comply with Fed. R. App .P. 29(c)(3) and Cir. R. 26.1(b), or other sanctions ordered, it is evident that this court considers significant those conflicts of interest that arise from personal relationships; it was a personal relationship between Santos and the amici counsel that created the conflict of interest at issue.

In my case, it was not merely counsel arguing a position to the court; it was the court itself issuing orders and instructions establishing positions of fact and law in the case.

This complaint should not be considered time-barred. As the argument section of my certiorari petition details, the defendants were allowed by both the district court and your court to prevail upon affirmative defenses asserted for the first time more than twelve years after the lawsuit was filed, defenses available, if at all, all along.

I declare under penalty of perjury that --

(1) I have read Rules 1 and 2 of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

Signature

_____

Date executed

December 10, 1999

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999

CHIEF JUDGE

No. 99-7-372-36

IN RE COMPLAINT AGAINST DISTRICT JUDGE JAMES B. MORAN

BEVERLY MANN
Complainant

ORDER

For the reasons stated in the accompanying memorandum, this judicial misconduct complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability as it is "directly related to the merits of a decision or procedural ruling."

R – 25

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999
CHIEF JUDGE

No. 99-7-372-36

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

The complainant has filed a judicial misconduct complaint about the judge who was at one time assigned to her case. The complaint is that the trial judge should not have entered some of the rulings that he did as he should have recused himself. Complainant has also stated that she is raising this point in a petition for writ of certiorari that she intends to file in the United States Supreme Court. Complainant has previously raised this issue in a judicial misconduct complaint that was dismissed.

A judicial misconduct proceeding is not a permissible alternative to an appeal. It is not an error-correction device. See 28 U.S.C. § 372(c), and the accompanying House of Representatives Report No. 96-1313, 96th Cong., 2nd Sess. (1980) at 10. The complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability.

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999

CHIEF JUDGE

No. 99-7-372-38

IN RE COMPLAINT AGAINST CIRCUIT JUDGE FRANK H. EASTERBROOK

BEVERLY MANN
Complainant

ORDER

For the reasons stated in the accompanying memorandum, this judicial misconduct complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability as it is "directly related to the merits of a decision or procedural ruling."

R – 27

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999

CHIEF JUDGE

No. 99-7-372-38

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

The complainant has filed three judicial misconduct complaints against judges who have been assigned her underlying lawsuit. This complaint is against a judge who was on the appeal. Complainant alleges that the judge has made erroneous rulings and curtailed complainant's filings in the appeal. The underlying case and the appeal have been decided against her and she has filed a petition for writ of certiorari to the United States Supreme Court. That is the proper forum and this is not.

A judicial misconduct proceeding is not a permissible alternative to an appeal. It is not an error-correction device. See 28 U.S.C. § 372(c), and the accompanying House of Representatives Report No. 96-1313, 96th Cong., 2nd Sess. (1980) at 10. The complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability.

R – 28

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999

CHIEF JUDGE

No. 99-7-372-37

IN RE COMPLAINT AGAINST DISTRICT JUDGE
WAYNE R. ANDERSEN

BEVERLY MANN
Complainant

ORDER

For the reasons stated in the accompanying memorandum, this judicial misconduct complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability as it is "directly related to the merits of a decision or procedural ruling."

R – 29

THE JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 South Dearborn Street
Chicago, Illinois 60604

December 22, 1999

CHIEF JUDGE

No. 99-7-372-37

IN RE COMPLAINT AGAINST A JUDICIAL OFFICER

MEMORANDUM

The complainant has filed three judicial misconduct complaints against judges who have been assigned her underlying lawsuit. This complaint is against a trial judge. The complaint is that the judge erroneously granted a motion for summary judgement without reviewing her earlier filed response and that the judge tried to pressure her into settlement. The case was decided adversely to her. She appealed and lost on appeal.

A judicial misconduct proceeding is not a permissible alternative to an appeal. It is not an error-correction device. See 28 U.S.C. § 372(c), and the accompanying House of Representatives Report No. 96-1313, 96th Cong., 2nd Sess. (1980) at 10. Complainant appealed and lost. That was the proper forum. This is not. The complaint is dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) and Rule 4(c)(2) of the Rules of the Judicial Council of the Seventh Circuit Governing Complaints of Judicial Misconduct or Disability.

December 27, 1999

Gino Agnello
Clerk, Court of Appeals
for the Seventh Circuit
21 South Dearborn Street
Chicago, Illinois 60604

Re: Petition to the judicial counsel for review of dismissal of judicial miscount complaints

Dear Mr. Agnello:

I hereby petition the judicial council for review of the chief judge's orders dismissing respective judicial misconduct complaints that I filed earlier this month against Judges Frank Easterbrook, Wayne Andersen, and James Moran. (I'm enclosing four corrected copies of page 2 of my complaint against Judge Easterbrook; the originals that I submitted contain numerous typographical errors in a paragraph that was not spell-checked.)

The chief judge has ruled that judicial misconduct, including brazen and undisclosed conflict of interest, is mere "error" and therefore is beyond the scope of 28 U.S.C. § 372(c). But because misconduct, by its nature, is error, this interpretation effectively nullifies that statutory subsection.

Judge Posner also has interpreted the availability of appeal to the United States Supreme Court via a petition for writ of certiorari as eviscerating his own statutorily imposed obligation and that of this circuit's judicial conference, but he provides no explanation for his view that the former and the latter are mutually exclusive. He cites to a subsection of the statute, but that is not what the subsection says.

The judicial councils of at least two other circuits, the Ninth and the Fifth, interpret § 372(c) as actually meaningful. See, e.g., *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995); *In re McBryde*, 117 F.3d 208 (5th Cir. 1997).

Not surprisingly in light of his interpretation of that statutory subsection as meaningless, Judge Posner apparently has never sustained a complaint of judicial misconduct – at least not publicly and, almost certainly, not privately, either. Much less would he actually sustain a complaint against one of his former business partners, a current immediate colleague. He should have recused himself concerning my complaint against Judge Easterbrook, but, instead, he misrepresented the nature of my complaint against that judge. The essence of my complaint against Judge Easterbrook is that he used improper tactics ranging from unpublished resolution of the appeal to the blocking of my use of a transcript of oral argument and the blocking of F.R.A.P. 28(j) submissions during the six-week pendency of my petition for rehearing *en banc* to prevent serious consideration of that petition. (Why, incidentally, did that petition remain pending for more than four weeks beyond the time allotted by your court's internal procedural rules? Was the petition even distributed at all, or did Judge Easterbrook have clerk "heid" block its distribution as he had her/him block the distribution of my other filings during that six-week period?)

A few days after I submitted my complaint against Judge Easterbrook, I supplemented it with a submission showing that he had backdated by a day an order denying my motion to recall the mandate and for clarification or other revision of the order that resolved my appeals. On November 29, this court issued an opinion authored by another member of the panel in my appeals, in which Judge Easterbrook concurred, that conflicted with the order in my case. That

opinion is *Yang v. City of Chicago*, 99-4238 and 98-4330. The order denying my motion was dated November 29, but was not entered into the court's computer docket until sometime after 3:00 p.m. on November 30. I received a copy of the order on December 1 in an envelope postmarked November 30. I said in my complaint against Judge Easterbrook that he also apparently had blocked the distribution to the other two panel members of my motion to recall the mandate. I asked that the motion be distributed to those other members for their consideration, in accordance with F.R.A.P. 27(c).

On December 5, I had submitted a motion titled "Motion Pursuant to F.R.A.P. 27(c) for Review by the *en Banc* Court or by a Three-Judge Panel." The motion was mailed back to me unfiled.

I also said in that supplemental submission that early on November 29, I submitted a draft copy of my certiorari petition in supplement to my motion but it was not entered into the court's computer until two or three days later. Then the entry was inserted into the docket listing above the order denying the motion. I said that this recalled Judge Easterbrook's manipulation of the release of an opinion he authored, in which another panel member in my case concurred, that conflicts in several respects with the order issued in my appeals. That opinion, in *Neal v Honeywell*, Inc., 98-1728 and 98-3162, was issued four months after oral argument in that case and two days after the mandate was issued in my case.

On December 21, 1999, your court issued another opinion that conflicted with the order in my case, also authored by Judge Easterbrook, also in which another panel member in my case concurred, The panel in my case had found my appeal from the dismissal of a count pursuant to

Rule 12(b)(6) unworthy of its mention, yet Judge Easterbrook in *Walker v. Walker v. Nat'l Recovery, Inc.*, 99-2119, recited the law pertaining to Rule 12(b)(6) as necessarily conflicting with his conclusion in my case that the issue was unworthy of mention. *Walker* was argued a month before my motion to recall the mandate was denied.

My complaint against Judge Andersen contains an assertion that his conduct was predicated upon an accurate prediction that, as a *pro se* appellant in civil litigation, I would receive no actual appellate review. My complaint against Judge Moran, which establishes his family relationship with and *ex parte* meetings with a defendant in my lawsuit, contains the assertion that much of his misconduct was geared toward the depletion of my financial resources in order to preclude my representation by paid counsel on appeal, thus effectively (and predictably) denying me actual appellate review.

Judge Posner dismissed my earlier complaint against Judge Moran, brought during the pendency of the first set appeals in the case, because, he said, it had happened several years earlier and the judge had, after all, eventually recused himself. But that complaint was brought before Judge Moran's misconduct had had its final effect, and also before the defendants in my lawsuit were allowed to raise affirmative defenses in the case more than twelve years into the pendency of the litigation and before your court found my assertion of the doctrines of waiver and law of the case unworthy even of its discussion. It also was before your court also found unworthy of its discussion my assertion of the new circumstances of recent Supreme Court authority and of the newly found statutory immunity upon which summary judgments were granted thirteen years into the litigation, which altered my rights under federal civil rights law.

I was denied appellate review. Non-superficial appellate review requires knowledge by the appellate panel of the nature of the case, of the procedural and substantive record in the case, and of the issues and arguments on appeal, none of which any of the appellate panel members had. My complaint against Judge Easterbrook uses specifics to show that *the panel did not even know the most basic procedural history of the case, although that knowledge was essential to appellate review in the case.*

In my opening and reply briefs in my appeals, I discussed Judge Andersen's conduct. The appellate panel didn't know that, though, because no member of it read any portion of my briefs.

In my briefs in the earlier set of appeals, I discussed Judge Moran's conduct, but the appellate panel did not know that because no member of the panel read any but a single section of my opening brief. In the recent appeals, I did initially include it as an issue in my opening brief, but after the court denied my motion for leave to file an oversized brief in light of the large number of issues presented in the appeals and the large number of orders at issue, I edited it out of my final draft. But, surely, this council cannot state in good faith that the appellate panel, which addressed virtually none of the issues I raised in the appeal, would have addressed that issue had I raised it.

In one of the memorandum opinions at issue in my complaint against Judge Moran, that judge stated extensive purported findings of fact yet failed in the memorandum opinion to disclose his relationship with that defendant and his social meetings with her, thus misrepresenting to any reader of the memorandum opinion that his stated findings of fact were those of an impartial jurist. This hardly is ordinary

error and it hardly is an improper matter for a misconduct complaint brought under 28 U.S.C. § 372(c). In the recent appeals, I did appeal directly from Judge Moran's three memorandum orders in light of new Supreme Court authority and in light of determinative new circumstances, but, in contravention of this circuit's and Supreme Court authority, the panel did not even acknowledge the existence of the issue and, it appears, did not *know* the issue existed.

Judge Posner concludes that the success of judicial misconduct vindicates the misconduct. But it does not. Whatever Congress' intent in passing 28 U.S.C. § 372(c), it was not to provide circular *carte blanche* to commit judicial misconduct – I don't think. Given that I did not receive appellate review of the orders (even though I had filed a separate notice appeal and paid a separate filing fee concerning Judge Moran's orders), Judge Posner's ruling is pure gimmickry. There is a material distinction between error in appellate review and no appellate review at all, however cutely disguised. In this instance, it wasn't even disguised. Having handled the appeal deliberately incompetently upon the presumption that no one who mattered ever would know about it, Judge Easterbrook tried to ensure that no one who mattered ever would know about it. I supply the judicial council with a copy of my certiorari petition as I am filing it, because it illustrates with precision this truth.

A procedural difference between the mandate of 28 U.S.C. 372(c) and an appeal of a judgment is that the statute requires that the allegation of judicial misconduct be acknowledged, considered and discussed in the resolution of the complaint. There is no comparable requirement in appellate procedure, at least not one that your court respects.

Judge Posner as chief circuit judge should be troubled

by the judicial conduct at issue here. Instead he applauds it and mocks the concept of the statute. He is a self-righteous hypocrite, as is his colleague Judge Easterbrook.

I had not yet filed my certiorari petition when I received copies of Judge Posner's three orders, so I will present the following question in that petition:

> Whether judicial misconduct, including brazen undisclosed conflict of interest, is beyond the scope of 28 U.S.C. § 372(c) as mere "error," or whether, instead, the interpretation of that statutory subsection as precluding consideration of judicial misconduct complaints on the basis that such misconduct constitutes "error" effectively nullifies the statutory subsection; and whether the availability of appeal to the United States Supreme Court via a petition for writ of certiorari eviscerates the obligations of a circuit's chief judge (and the circuit's judicial conference) as delineated in the statute.

But I ask the judicial council to consider the question, too. It is as inconceivable that any member of the judicial counsel will vote to reverse the chief judge, irrespective of the merits of the complaints, as it was that the chief judge actually would act upon the misconduct. The conflict of interest inherent in this process always determines its outcome; it's a silly charade. This notwithstanding, I appeal from Judge Posner's interpretation of the statute as he states it in his three orders.

Very truly yours,

Beverly Mann
7261 North Campbell Avenue
Chicago, Illinois 60645

Supreme Court, U.S.
FILED
JAN 3 1 2000
CLERK

No. 99-1103

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

BEVERLY B. MANN,
Petitioner,

v.

THE CITY OF CHICAGO, a Municipal Corporation, JAMES D. MONTGOMERY, TIMOTHY D. O'HARA and JAYNE W. BARNARD,
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RECEIVED
FEB 0 2 2000
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Beverly B. Mann
Petitioner *Pro Se*
7261 North Campbell Avenue
Chicago, Illinois 60645
(773) 465-4587

23 pp

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CITATION TO, AND DISCUSSION OF, NEW AUTHORITY OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

I. THE AVAILABILITY OF CIRCUIT RULE 53 AS A MECHANISM BY WHICH THE COURT MAY QUIETLY, ARBITRARILY AND WITHOUT EXPLANATION DEPART FROM THE COMMON LAW WITHOUT CHANGING THE COMMON LAW IS MORE SUBVERSIVE OF THE RULE OF LAW THAN THE PROPOSITION THAT JUDGE EASTERBROOK IN HIS DISSENT IN *GRAY-BEY V. USA* REJECTS AS DOING EXACTLY THAT, AND HAS NO APPROPRIATE PLACE IN THE AMERICAN SYSTEM OF JUSTICE.

On January 7, 2000, the United States Court of Appeals for the Seventh Circuit issued an unpublished order pursuant to its Circuit Rule 53 (which permits the unpublished and summary resolution of appeals) in *Gray-Bey v. USA*, 99-4131, a habeas-petition case concerning an application for a certificate of appealability for an order authorizing the district court to entertain a second and successive petition for collateral review. The threshold subject of the unpublished order was the nature of 28 U.S.C. sec. 2244(b)(3) – specifically whether appellate courts can depart from that statutory subsection's stated requirement that the court rule upon the merits of the application within 30 days of its filing, which in that case was the date of issuance of the unpublished order.

The threshold issue pertaining to the merits of the application in that case was whether the applicant had waived – or as the dissent in that case termed it, forfeited – the grounds upon which he based his application because he had not asserted them in his initial collateral appeal.

The dissenting judge, apparently at whose behest the initially unpublished order was published as an opinion on January 24, 2000, stated his belief that the 30-day-time-limit

language of the statutory subsection is mandatory. He also expressed his belief both that the court lacks the legal authority to depart from mandatory language of a statute (presumably, absent unconstitutionality of the mandate language) and that the applicant in that case indeed had forfeited his substantive grounds for collateral review by failing to assert them in his initial habeas petition.

That judge in arguing the former point said, "In the end, the majority's approach rests on the proposition that federal judges have discretion to depart from federal statutes for good reasons – and that judges, rather than the political branches, define which reasons are 'good.' Few propositions could be more subversive of the rule of law." The judge in arguing the latter point, the one concerning the forfeiture of defenses, engaged in extensive analysis concerning the time limitations included in the statute at issue.

The petition for writ of certiorari that this supplemental brief supports concerns a purely civil lawsuit; the statute at issue in *Gray-Bey* is not at issue in this case. Yet the dissent in *Gray-Bey*, because of the specifics of its language and the identity of its author, Judge Frank Easterbrook (who, as the petition for writ of certiorari in this case discusses, headed the panel that issued the unpublished order that resolved the second set of appeals in the case), is relevant to the issues addressed in the section of the petition that appears at pp. 10-27.

The pertinent portions of Judge Easterbrook's dissent in *Gray-Bey* read:

> [Gray-Bey's] initial problem – one that does not make my colleagues' list of four issues to be briefed – is time....
>
> Only subsection (3) might authorize Gray-Bey's application in December 1999, more than six years after his conviction was affirmed (and more than three years after Congress added the one-year period of limitations to the law of collateral attack). *But the "right" that Gray-Bey wants to assert "was initially recognized by the Supreme Court" on December 6,*

1995, in Bailey v. United States, 516 U.S. 137 (1995), *more than four years before Gray-Bey filed his application. Far from being unavailable to Gray-Bey until now, Bailey came in time for Gray-Bey to present it on his first collateral attack. Gray-Bey lost not because Bailey is prospective only, but because he neglected to make the argument in the district court even though certiorari had been granted in Bailey on April 17, 1995, and the issue had been percolating for years*. 156 F.3d at 742-43. [Emphasis added.]

Gray-Bey now points to *Bousley v. United States*, 523 U.S. 614 (1998), which held that implementation of 18 U.S.C. sec. 924(c)(1) (the statute construed in *Bailey*) can lead to constitutional problems cognizable on collateral attack. Improper advice to a defendant pleading guilty could make the plea unintelligent, *Bousley* held; similarly, a trial record that lacks evidence adequate to establish all elements of the offense (as *Bailey* defines them) could support collateral relief to avoid imprisoning an innocent person. But these are not new principles of constitutional law. *Davis v. United States*, 417 U.S. 333 (1974), establishes that actual innocence justifies collateral relief under sec. 2255, cf. *Jackson v. Virginia*, 443 U.S. 307 (1979), and the rule that involuntary guilty pleas may be set aside is even older. More than a year before *Bousley*, we applied these principles in collateral attacks based on *Bailey*. E.g., *Stanback v. United States*, 113 F.3d 651 (7th Cir. 1997).

Gray-Bey's first collateral attack failed solely because he should have raised the issue sooner; that conclusion is incompatible with his current submission that 1997 or 1998 was too soon to invoke *Bailey*. Nothing that happened in 1998 restarts the time for a collateral attack. *The initial principle of Bailey, which is the crucial time under sec. 2255 para. 6, dates from*

1995, and the retroactivity rules predate Bousley.... [Emphasis added.]

In re Davenport, 147 F.3d 605, 609 (7th Cir. 1998), *requires us to ask whether Gray-Bey's initial sec. 2255 motion gave him "a reasonable opportunity to obtain a reliable judicial determination of the fundamental legality of his conviction and sentence."* In *Davenport* this court held that when the basis of the claim has not been legally established at the time of the first petition, the prisoner has not received a reasonable opportunity. The first petition filed by Sherman Nichols (one of two petitioners in *Davenport*) was resolved before the Supreme Court issued *Bailey*, and the law in this circuit was contrary to the way *Bailey* interpreted the word "use" in sec. 924(c)(1). Nichols therefore could not have obtained relief by a sec. 2255 petition. Gray-Bey, however, is differently situated. [Emphasis added.]

Gray-Bey filed his first sec. 2255 petition before Bailey, but final decision came later. Had Gray-Bey properly preserved an argument about the meaning of "use" in sec. 924 (c)(1), it would have been decided by this court, under correct principles of law, on his first sec. 2255 petition. Had we erred, the Supreme Court could have corrected us by certiorari. The reason Gray-Bey did not receive a decision was his own default. *It is impossible to say that "the remedy by motion [under sec. 2255] is inadequate or ineffective to test the legality of his detention" when the only shortcoming is the petitioner's omission of an issue. That omission is not a problem in the remedy; it is a problem in litigation strategy.* It is, indeed, a fatal problem, for when *Bousley* held that *Bailey* can support collateral review, the Justices stressed that the legal arguments must have been presented to the district court--and they added that the weight of existing precedent against a position does not justify

omission. *Bousley*, 523 U.S. at 622-23.... [Emphasis added.]

Next in logical sequence, if Gray-Bey's application were timely, would be the question whether a successive petition may be justified under sec. 2255 para. 8(2) on the ground that *Bailey* is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."

Bousley, which was decided while Gray-Bey's prior appeal was pending, holds that Bailey claims may be raised on collateral review, and that *Bailey* may be applied retroactively to at least some cases (though perhaps *Bousley* himself was not a beneficiary, having forfeited his claim). There is a nice question about the scope of sec. 2255 para. 8(2):

> Does the successive petition have to assert reliance on a "new rule," or is an old rule newly made retroactive enough?

From Gray-Bey's perspective, however, *Bailey* is not a "new rule", as I have already observed; he argued it in 1997 when briefing his appeal.

Had we rejected that claim on the ground that *Bailey* does not apply retroactively, then it would be tempting to say that *Bousley* reopens the door. But because Gray-Bey lost on forfeiture rather than the merits, one would think that the kind of new rule adequate to start a new period must be one that retroactively changes the law of forfeiture, rather than a decision making explicit that Bailey "applies."

We need not wrestle this one to the ground, however, because *Bousley* does not make retroactive a new rule "of constitutional law".

Bailey resolved an issue of statutory interpretation, and *Bousley* observed that the proper understanding of sec. 924(c)(1) may lead to collateral relief to the extent that a statutory error gives rise to a constitutional flaw. In *Bousley* itself the potential flaw was an involuntary

> guilty plea (made involuntary by the fact that the defendant did not know the elements of the offense to which he was pleading). This is related to the approach our court earlier adopted for *Bailey* issues in *Stanback*. Similarly a statutory problem could give rise to a constitutional one if the record did not contain enough evidence to permit a rational trier of fact to find guilt beyond a reasonable doubt. As *Bousley* observed, however, defendants trying to take advantage of that possibility have a heavy burden, for they must show not only that the record fails to establish "use" but also that they did not "carry" the weapon, the other way to commit the crime.....
>
> Does *Bousley* make retroactive a "new rule of constitutional law" that the evidence must be sufficient to support the charge? Not at all; that rule has been around since *Davis* and *Jackson*. Gray-Bey's second principal contention, that the jury instructions in his case did not anticipate *Bailey*, is not even a constitutional argument, for the reasons given in *Young v. United States*, 124 F.3d 794, 798-99 (7th Cir. 1997).... I therefore conclude that a successive petition cannot be authorized under sec. 2255 para. 8. *Gray-Bey must live with the forfeiture in his prior petition*, just as our published opinion concludes. [Emphasis added.]

Those statements, when coupled with the unpublished order in the appeals in this petitioner's case, suggest a belief, at least by Judge Easterbrook, that common law, however unremittingly consistent, is not a part of the rule of law but is instead, at best, a rule of thumb. In this petitioner's case, Judge Easterbrook and his colleagues ostensibly found the issue of waiver (or forfeiture) of defenses among those unworthy even of their discussion, although the common law of their circuit certainly and unfailingly *appears* to have established it as a rule of law when (as in *Gray-Bey* and in the

petitioner's case) the defenses were available, if at all, at the time of the initial appeal in the case.

It may be that, as Judge Easterbrook said in his dissent in *Gray-Bey*, the approach of the majority in that case "rests on the proposition that federal judges have discretion to depart from federal statutes for good reasons – and that judges, rather than the political branches, define which reasons are 'good.'" It may be also that, as the judge said, few propositions could be more subversive of the rule of law; it is not the purpose of this brief to address the merits of that statement. But at least the reasons for the departure in *Gray-Bey* were "good." And even if not good, at least they were defined.

The petition in this case asserts that federal appellate judges – who do have discretion to amend or repeal federal common law in a manner not inconsistent with the Constitution or with the holdings of this Court – nonetheless lack the discretion to quietly depart in arbitrarily selected cases from the pertinent law, whatever the manner in which that law was promulgated. The petition asserts, in other words, that federal appellate judges lack the discretion to depart from the law without changing that law, and that their quiet assumption of the power to do so in this case (and presumably in others) violates the Constitution's Fifth Amendment.

The availability of Circuit Rule 53 as a mechanism by which the court may quietly, arbitrarily and without explanation *depart from the common law without changing the common law*, as occurred in this case, is, this petitioner submits, more subversive of the rule of law than the proposition that Judge Easterbrook in his dissent in *Gray-Bey* rejects. It has no appropriate place in the American system of justice.

Judge Easterbrook's lament about the subversion of the rule of law presumes, of course, that such a thing as the rule of law still exists. The petition in this case argues that the Seventh Circuit's Rule 53 and its counterparts in the other circuits have rendered appellate-court application of the law merely optional and thus have subverted the very concept of the rule of law. If so, Judge Easterbrook need not worry about

his colleagues' subversion in *Gray-Bey* of the rule of law, as it is logically impossible to subvert what does not, in any event, exist.

That judge, who in *Gray-Bey* so meticulously juxtaposed the procedural chronology of that case with the chronological development of the case authority he cited in support of his dissenting finding that Gray-Bey had forfeited his defenses, nonetheless in *this* case was content to both rely upon and to conveniently ignore case authority issued years before the resolution of the initial appeals in the case, in *reversing, without explanation*, the rulings in those initial appeals. No timeliness inquiry here; only a finding that timeliness was an issue unworthy of the court's discussion.

"The issue had been percolating for years," the judge said in his dissent in *Gray-Bey*. But in this case, no such analysis; in fact, no analysis at all. In this case, a gimmicky word-game approach sufficed.

Judge Easterbrook should have worried about the subversion of the rule of law when he himself could have closed the barn door before the horses escaped.

II. IT IS, PERHAPS MOST OF ALL, THE EASY ENABLING OF CONVENIENT FICTIONS (OF THE SORT ILLUSTRATED BY CONTRASTING *BELLAVER V. QUANEX CORP.* WITH THE COURT'S HANDLING OF THE IDENTICAL ISSUE IN THIS CASE) THAT RENDERS THE SUPPOSEDLY PROCEDURAL CIRCUIT RULE 53 AND ITS COUNTERPARTS LEGAL ABOMINATIONS.

Virtually throughout the very lengthy pendency of this litigation, this petitioner has seen the issuance of one after another appellate or Supreme Court opinion that appeared to favorably (for her) determine one or another issue in this litigation, only to later see the appellate panel in her case fail, courtesy of Circuit Rule 53, even to acknowledge the existence of those *issues*. On January 18, 2000, a panel of the court of appeals for the Seventh Circuit issued an opinion, in *Bellaver v. Quanex Corp.*, 98-3708, that, when compared with

that court's handling of the identical issue in this lawsuit yet again illustrates the substantive effect upon the law that the ostensibly procedural Circuit Rule 53 has had.

The issue is gender stereotyping as this Court addressed it in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The district court in this petitioner's case said that *Price Waterhouse* applies only to accountants and requires expert testimony to establish gender stereotyping. The district court also said the petitioner could not prevail because she had not established that defendant James Montgomery, the City of Chicago's corporation counsel, was aware of the discriminatory motive and therefore had no reason to disbelieve the accuracy of defendant Timothy O'Hara's submitted evaluations of the petitioner's job performance.

The petitioner had addressed the gender discrimination issue extensively in her opening brief in the first set of appeals in this litigation, arguing that the district court's memorandum opinion, 1994 U.S. Dist. LEXIS 9893 (Jul. 18, 1994, 84 C 11020 N.D. Ill.), which stated the reasons for his summary judgments entered three years earlier in the case, contained statements of purported law that conflicted directly with this Court's rulings in *Price Waterhouse*. The issue, in fact, occupied the first nine pages of the "Argument" section of that brief. (See this brief's Appendix A). Yet the unpublished order that resolved that set of appeals did not even acknowledge the existence of the issue.

In the recent set of appeals, the petitioner again argued the issue, citing *Oncale v. Sundowner Offshore Servs., Inc.*, 118 S.Ct. 998 (1998), and *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257 (1998), both of which, she asserted, directly contradict statements of law contained in that 1994 memorandum opinion. But the issue was among those on the laundry list that the appellate panel said was unworthy of its discussion.

The petitioner does not claim here that *Bellaver* constitutes new law of the Seventh Circuit and that it must be applied retroactively to her case. She asserts the contrary; she argues that *Bellaver* merely applied the law as delineated in

1989 in *Price Waterhouse*, and in 1998 in *Ellerth* and *Oncale* – law that she was entitled to have the appellate court consider in her own appeals, law that was not considered in her appeals because Circuit Rule 53 invited the convenient fiction that this and other significant issues in the case *did not even exist*.

It is, perhaps most of all, this encouraging of convenient fictions that renders these supposedly procedural circuit rules legal abominations. Subversion of the rule of law? Which law, exactly – the published law or the secretly decreed law? They are not the same.

Respectfully submitted,

Beverly Mann
Petitioner *Pro Se*

APPENDIX

I. COUNTS VII AND XIII - U.S. SUPREME COURT PRECEDENT ESTABLISHES THE CHARGED CONDUCT AS UNLAWFUL GENDER DISCRIMINATION

II.

> As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees assuming or insisting that they matched the stereotype associated with their group, for ... Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. (Price Waterhouse v. Hopkins, 109 S.Ct. 1775, 1791.) In the specific context of sex stereotyping, *an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, had acted on the basis of gender.* (Price Waterhouse, at 1790-91. Emphasis added.) *An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22; out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.* (Price Waterhouse, at 1791. Emphasis added.)

Or maybe not. District Judge Lindberg stated that he granted summary judgment in favor of the defendants in Mann's two gender-based claims partly because the defendants' proffered justification for their conduct -- that Mann was "too pushy or aggressive and lacked humility" -- was, as a matter of law, "a legitimate nondiscriminatory reason for plaintiff's termination." (App. at A-59 -61.) This charge against Mann, the judge said, was not gender-specific; it was a gender-neutral charge that Mann had "poor interpersonal skills." (App. at A-59 -61.)

The record is clear that the charge of aggressiveness against Mann concerned only her conduct in court, not her

relations with anyone outside of court; Timothy O'Hara, upon whose representations Montgomery and Barnard purported to rely as the basis for the decision to discharge Mann, testified that he himself "liked" Mann when they worked together (Tr. 371), and nowhere in the record is there any allegation that Mann had what the judge termed poor interpersonal skills in her relations with anyone but judges in court. The complaint by O'Hara against Mann that she lacked sufficient humility about "her accomplishments," as O'Hara put it, is evidence solely that O'Hara harbored resentment that Mann *had* accomplishments, hardly a legitimate nondiscriminatory reason, as a matter of law, to discharge Mann rather than O'Hara.

The judge in his Memorandum Opinion never mentioned the nature of the conduct that he said constituted poor interpersonal skills, and he never acknowledged the language from Price Waterhouse that held, *expressly*, that the characterization used against Mann -- a description of her as too aggressive in a traditionally male job, a job that by its nature requires aggressiveness -- is not gender-neutral but clearly gender-specific and constitutes unlawful gender-based discrimination. In granting summary judgment without citing the nature of the conduct at issue, the judge effectively held that it is not the substance of the conduct that determines viability as a defense, but rather the choice of generic labels used to describe that conduct. For that proposition, he cited none other than Price Waterhouse. (App. at A-59.)

In rejecting the precedent of Price Waterhouse, the judge said:

> Plaintiff at bar had no evidence remotely similar to that in Price Waterhouse; she presented no evidence of overtly sex-based comments that affected the decision to terminate her, presented no expert testimony that gender-neutral remarks were the product of sex stereotyping, and presented no evidence that other fe-

male employees were evaluated in sex-based terms. (App. at A-60.)

Apparently, Judge Lindberg does not consider the justices of the Supreme Court sufficiently expert in the subject of sex stereotyping for him to accept their finding on the issue, and he therefore considered himself at liberty to reject it. Perhaps before she relied upon Price Waterhouse as authority, Mann should have qualified Justice Brennan, its author, as an expert on the subject. Or perhaps she should have enunciated to this judge what is an elementary tenet of law: that apart from the separate issue of whether or not the plaintiff in Price Waterhouse was *required* to produce expert testimony as part of her *prima facie* case to establish her premise, the plaintiff in that case *did* establish her premise as a matter of law, and that once that premise was established, subsequent litigants need not reestablish the same point of law by use of an expert or otherwise.

Moreover, Mann *was* prepared to produce expert testimony -- the testimony of *two* experts, in fact -- to support her claim that aggressiveness in court is part and parcel of a litigator's job, even when it results in conflict with judges. Her experts, unlike the one in Price Waterhouse, weren't social psychologists, though. They were litigators. One was a colleague of Mann's in the Torts Division, an attorney named John Dugan, whose name appeared on Mann's witness list and whose deposition testimony was included in Mann's response to the summary judgment motion. Dugan testified that he had had many confrontations with judges in court when representing the City, and that O'Hara was aware of these confrontations. Dugan also testified that in his expert opinion as an experienced litigator, such problems were unavoidable (Doc. # 320, Dugan dep. at 64-65).

Mann also was prepared to produce the expert testimony of Montgomery, whose name appeared on Mann's witness list and who eventually testified at the trial of the

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remaining counts that as a litigator he himself "regularly" had had conflicts with judges in court (Tr. 103.) Montgomery, a male, doubled as an expert witness and as an occurrence witness; he was both an experienced litigator and the decisionmaker about whom the judge said "there was no evidence that he would have considered the same traits as positive or even neutral in a male employee" (App. at A-59).

On the issue of the gender-specific nature of O'Hara's complaint that Mann lacked humility, the district court has stated in its Memorandum Opinion that it based its summary judgment on this issue not upon a rejection of Mann's account of the evidence but upon an adoption of it. O'Hara, whose name appeared on Mann's witness list, served as a proffered expert in support of Mann's position on this issue; he submitted a job performance evaluation of Dugan, a male, *praising him for being "pridefully boastful"* (Pltf's Exh. 15) *and took no retaliatory action against him as he did against Mann.* O'Hara's testimony would serve the same role in this case as did the testimony of the social psychologist in Price Waterhouse.

As for the judge's claim that Mann was required as part of her *prima facie* case to present the expert testimony of a social psychologist because the plaintiff in Price Waterhouse did so, Mann simply cites to Federal Rule of Evidence 702. That Rule begins, "If scientific, technical, or other specialized knowledge will assist the trier of fact ...." In fact, there are a lot of people whose knowledge on this issue is all too specialized, but they are not social psychologists. They are women litigators, and precious few have found their way to the federal district bench, almost none to the federal appellate bench. So Mann obliges the district judge and presents their expert opinions here:

> Discrimination in the Courts: Supreme Court task forces on gender bias in the courts have documented the variety of disparate and demeaning behavior

> women often encounter.... The studies report that women's arguments and courtroom demeanor are likely to draw far more comments, including reprimands for being too aggressive, when more aggravated conduct by male attorneys goes unquestioned." The American Bar Association Commission on Women in the Profession Report to the House of Delegates, approved by the House of Delegates on August 10, 1988, at p. 9-10.

Even Judge Lindberg might concede that as women litigators, those who participated in these studies have specialized knowledge on this issue that would assist *triers of fact*, a term of art here, such as he.

"Because most judges are men, who have experienced the traditional norms of male socialization, their instinctive reaction is to accept the perspective of the employer." Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1203 (1989). Judge Lindberg, in proclaiming as facially gender-neutral and as evidence of poor interpersonal skills a charge against a litigation attorney that she is too aggressive in court, has provided a glaring testimonial to the reason why the right to a jury trial, when provided by law as it is on Mann's Count VII, is a fundamental one.

This judge stated that in Price Waterhouse "there was very strong evidence of sexual stereotyping in the employment decision," but had that case been before him he would have resolved it as he did Mann's case: with entry of summary judgment for the defendants and a Memorandum Opinion that spewed a litany of nonspecific and conclusory platitudes and proclaimed in blanket fashion that there was no evidence to support the plaintiff's allegations. This judge does not like the laws by which both these cases were brought, and he will not enforce them. It is that simple, and it is the sum and substance of what this appeal is about.

Nor is this judge forthright in citing Price Waterhouse as authority that requires Mann to have produced evidence "that other female employees were evaluated in sex-based terms." The plaintiff in Price Waterhouse did not claim that anyone other than she was evaluated in gender-specific terms, and the law unequivocally requires no such claim; gender-based discrimination is gender-based discrimination, even when it occurs against only one member of that gender among many in the potential pool, as is often the situation in *quid pro quo* harassment cases. Meritor Savings Bank v. Vinson, 477 U.S. 57; Texas Dept. of Community Affairs v. Burdine; 450 U.S. 248, 252-56; King v. Board of Regents, 898 F.2d 533 (7th Cir. 1990); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

Nor, contrary to this judge's holding, is Mann required to show that the defendants harbored gender-based "animus." King v. Board of Regents. Mann need only show that the terms and conditions of her employment were altered by the discriminatory conduct. Price Waterhouse.

The judge states that he granted summary judgment in these two counts because "[t]here was, in other words, no reason for defendant Montgomery not to rely upon defendant O'Hara's evaluations in making the decision to terminate plaintiff." (A-61 -62.) Apart from the issue of whether it was necessary for Mann to show knowledge by Montgomery of O'Hara's gender-based motive for his conduct in order for her to maintain a claim of gender discrimination either against the City under either Title VII or against O'Hara under 28 USC 1983, *the judge himself acknowledged that Mann had complained to Montgomery about O'Hara's treatment of her and that she had described the treatment.* (App. at A-61.)

Montgomery, asked, "Did you make any effort to determine whether she had good reason to bitch about her treatment?" answered, "Well, to some extent, I was aware of some good reason that she had to bitch about her treatment because I was aware that evaluations that I got from Tim were

not all as candid as they could have been." (Tr. 97-98.) *Montgomery also acknowledged that Mann had handed him a six-page document listing specifics of her job record* that, if true, proved O'Hara's evaluations false, and *acknowledged that he did read the document* (Tr. at 96-98; 152). The judge said that this all meant that Mann was complaining that O'Hara's evaluations of her were too high, not that they were too low, but Montgomery's interpretation was otherwise; at trial, *Montgomery said he recognized that Mann's complaint concerning O'Hara's evaluations of her were that they were too low, not that they were too high.* (Tr. 99). Montgomery was aware that O'Hara harbored no hesitation in submitting defamatory evaluations of Mann.

Moreover, the evaluations themselves were *facially questionable*. They failed to rate Mann at all in key categories; they contained inherent contradictions; they contained overtly irrational statements. Further, Montgomery testified that he was aware that Torts Division attorneys other than Mann had had problems with judges (Doc. # 321, Montgomery. dep. at 40-44).

It has occurred to Mann that this judge's findings of "no evidence" or "no reason" have taken on a Mad Hatter connotation in this case; the judge has used those phrases most often when the evidence he says does not exist was explicit and was definitive of the issue at hand.

Nor does a finding that a lack of knowledge by Montgomery of gender-based motive by O'Hara end the inquiry into liability on these two counts. With respect to Count VII, brought by virtue of 42 USC 1983, O'Hara himself was a named defendant, as was Barnard. With respect to Count XIII, brought by virtue of 42 USC 2000e et. seq., that statute and its regulatory guidelines bar gender-based discrimination (including harassment) *by supervisors*, whom it includes in its definition of the term "employer." (App. at A-82; A-83(a)); Meritor Savings Bank v. Vinson, 477 U.S. 57.

Other of the judge's findings are his own fiction, as well:

> "Montgomery concluded that plaintiff's poor job performance justified terminating her....(D)efendants produced evidence that the decisionmaker, defendant Montgomery, terminated plaintiff for poor job performance; and plaintiff failed to produce evidence that this reason was a pretext for sex discrimination. This court accordingly granted defendants summary judgment on the Supplemental Complaint." (App. at A-6 -62.)

This is the total reference the judge makes to evidence produced either by Mann or by the defendants concerning the quality of Mann's job performance. He makes this defamatory generic finding, but *cites to no evidence of poor job performance on the part of Mann.* He provides no indication of what it is that he thinks Mann did not disprove. In fact, no evidence exists in the record that could support a conclusion that Mann performed her job poorly, but *the record is replete with evidence to the contrary, most of it in testimony by O'Hara.* (See Statement of Facts, above.) The record also includes Barnard's testimony that the statement contained in the original Exit Interview Report, that Mann was discharged for "inadequate performance of duties," was inaccurate. (Tr. 592-93).

As for Mann's Count VII, the judge said he granted summary judgment in favor of the defendants because Mann "did not present evidence that Montgomery harbored discriminatory intent." (A-63.) Mann did produce evidence that Montgomery *knew of O'Hara's* discriminatory intent when he "rubber-stamped" it, however, as did Barnard, who also was a defendant in Count VII. Nor did this judge challenge the truth of Mann's allegations that the conduct of *O'Hara, the key defendant in Count VII,* constituted *obviously "purposeful and intentional acts."* Mann's allegations against O'Hara included O'Hara's admitted decision to deny Mann pay

raises that he provided for all the other attorneys in the Torts Division irrespective of their job performance, and his submission of defamatory job performance evaluations of her that he knew were false and that ultimately and foreseeably were used to justify the destruction of her career.